(16,866.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 292.

HOSEA B. TULLIS, PLAINTIFF IN ERROR,

vs.

THE LAKE ERIE AND WESTERN RAILROAD COMPANY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1898.

1 In the United States Circuit Court of Appeals for the Seventh Circuit, January Session, A. D. 1898.

HOSEA B. TULLIS, Plaintiff in Error, *vs.* THE LAKE ERIE & WESTERN RAILroad Company.	No. 455. Error to the Circuit Court of the United States for the District of Indiana.

Certificate to Supreme Court.

Before Woods, Jenkins, and Showalter, circuit judges.

In this case, duly argued and submitted to this court, there arises a question of law concerning which this court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow-servant, for which the defendant in error is alleged to be responsible by force of an act of the legislature of Indiana approved by the governor of the State March 4, 1893. The first section of the act reads as follows:

"1. That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases:

"*First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when
2 such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform, and did conform.

"*Third.* Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employé or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employé or fellow-servant, at the time acting in the place, and

performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws."

For the entire act reference is made to Session Laws of 1893, page 294, Burns' Annotated Indiana Statutes, Revision of 1894, paragraphs 7083 to 7087, inclusive.

The Lake Erie & Western Railroad Company is a corporation of the State of Illinois owning and operating a railroad extending from Peoria, Illinois, into and through the State of Indiana. It is contended that the statute referred to is invalid because inconsistent with the fourteenth amendment of the Constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this court is that material error was committed at the trial for which the judgment below should be reversed if the statute mentioned is valid, and that if the statute mentioned is invalid the judgment should be affirmed. The question whether that statute is valid or violates the fourteenth amendment of the Constitution of the United States the court hereby orders certified and submitted to the Supreme Court of the United States for its proper decision.

WM. A. WOODS.
JAS. G. JENKINS.
JOHN W. SHOWALTER.

3 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 2, inclusive, contain a true copy of the certificate of the United States circuit court of appeals for the seventh circuit to the Supreme Court of the United States in the case of Hosea B. Tullis *vs.* The Lake Erie and Western Railroad Company, No. 455, October term, 1897, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of the said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 13th day of April, A. D. 1898.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: Case No. 16,866. U. S. circuit court of appeals, seventh circuit. Term No., 292. Hosea B. Tullis, plaintiff in error, *vs.* The Lake Erie & Western Railroad Company. (Certificate.) Filed May 2nd, 1898.

IN THE

Supreme Court of the United States.

HOSEA B. TULLIS, *Plaintiff in Error*,

v.

THE LAKE ERIE AND WESTERN RAILROAD COMPANY,
Defendant in Error.

BRIEF FOR THE PLAINTIFF IN ERROR.

This case presents the question whether the employers' liability act of Indiana, in so far as it relates to this case, is in conflict with that clause of the fourteenth amendment which declares that a state shall not deny to any person the equal protection of the laws.

The certificate shows that Tullis, while in the service of the railway company, sustained a personal injury by the negligent act of a fellow-servant.

The Indiana statute was passed March 4, 1893.

Acts 1893, p. 294.

On March 7, 1895, section 2 was repealed, with a proviso saving rights already accrued under it.

Acts 1895, p. 148.

The act of 1893 is embraced in the Revised Statutes of 1894, vol. 3, section 7083, *et seq.*

Section 1 (7083) is the only part certified, and reads as follows:

"7083. LIABILITY FOR PERSONAL INJURIES.—1. That every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"*First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or directions the injured employe, at the time of the injury, was bound to conform, and did conform.

"*Third.* Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws."

The remaining sections are not material to the present discussion.

Sufficient appears upon the certificate to show that Tullis predicated his action upon the fourth clause of

section one, as that clause is the only part of the law relating to the liability of an employer to one servant for injuries suffered by the negligence of a fellow-servant.

We take it this court will not declare the statute unconstitutional unless the very part upon which the action is grounded is in conflict with some certain clause of the constitution.

We ought not to be required to do more than show that the statute as applied to the parties and to the facts in this case, do not affront the fourteenth amendment. Unless said clause 4 does so it would seem the answer will be in the negative.

I.

It is now too late to say that a state may not regulate the liability of railway companies towards their employes for injuries suffered by the negligence of a co-employe, or fellow-servant.

Chicago & N. W. Ry. Co. v. *McLaughlin*, 119 U. S. 566;
Mo. Pac. Ry. Co. v. *Mackey*, 127 U. S. 205;
Minn. & St. Louis Ry. Co. v. *Herrick*, 127 U. S. 210;
Same v. *Beckwith*, 129 U. S. 26, 32;
Holden v. *Hardy*, 169 U. S. 366, 385;
Magoun v. *Ill. Trust & Sav. Bank*, 170 U. S. 283, 294.

This statute was lately challenged by a railway company in the courts of Indiana, in an action by a brakeman for personal injuries suffered by the negligence of the engineer of the train.

Pittsburg, C., C. & St. L. Ry. Co. v. *Montgomery*, 49 N. E. R., p. 583 (not yet reported in the state reports).

So much of the opinion as relates to the federal question is as follows:

"Appellant also contends that the act violates the equality clause of the fourteenth amendment of the constitution of the United States, demanding for every person the equal protection of the laws. The same provision, quoted from the bill of rights in the constitution of this state, is found word for word in the bill of rights of the constitution of Iowa. The supreme court of that state, in upholding the employers' liability act of that state, held that the provision mentioned in the bill of rights in the constitution of that state was, in effect, the same as the equality clause of the fourteenth amendment to the federal constitution, and that the employers' liability act did not violate either constitution in respect of equality of laws or equality of rights secured by each of said provisions, in *Bucklew* v. *Railway Co.*, 64 Iowa 611, 21 N. W. 103. That decision rests largely on two decisions made upon the subject of the constitutionality of the employers' liability act of Kansas and that of Iowa in the supreme court of the United States. Mackey had recovered a judgment for $12,000 damages against the Missouri Pacific Railway Company for injuries caused by a co-employe of that company, which, on appeal, was affirmed by the supreme court of Kansas. From that judgment the company appealed to the supreme court of the United States, on the ground that the Kansas statute violated the fourteenth amendment to the constitution of the United States. But that court affirmed the judgment, holding that the act in no way infringed that amendment. *Railway Co.* v. *Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161. Mr. Justice Field, speaking for the court, there said: '* * * The company calls the attention of the court to the rule of law exempting from liability an employer for injuries to employes caused by the negligence or incompetency of a fellow-servant, which prevailed in Kansas and in several other states previous to the act of 1874, unless he had employed such negligent or incompetent servant without reasonable inquiry as to his qualifications, or had retained him after a knowledge of his negligence or incompetency. The rule of law is conceded where the person injured and the one by whose negligence or incompetency the injury is caused are fellow-servants in the same common employment, and acting under the same immediate direction. * * * Assuming that this rule would apply to the case presented but for the law of Kansas of 1874, the contention of the company * * * is that the law imposes upon railroad companies a liability not previously existing, in the enforcement of which their property may be taken, and thus authorizes, in such cases, the taking of property without due

process of law, in violation of the fourteenth amendment. The supposed hardship and injustice consist in imputing liability to the company, where no personal wrong or negligence is chargeable to it or its directors. But the same hardship and injustice, if there be any, exist when the company, without any wrong or negligence on its part, is charged for injuries to passengers. * * * The utmost care on its part will not relieve it from liability, if the passenger injured be himself free from contributory negligence. The law of 1874 extends this doctrine and fixes a like liability upon railroad companies, where injuries are subsequently suffered by employes, though it may be by the negligence or incompetency of a fellow-servant in the same general employment and acting under the same immediate direction. That its passage is within the competency of the legislature we have do doubt. The objection that the law of 1874 deprives the railroad companies of the equal protection of the laws is even less tenable than the one considered. It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees, and the bridging of navigable rivers, are instances of this kind. * * * A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the fourteenth amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and liabilities imposed. * * * But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations, having for its object the protection of their employes, as well as the safety of the public.' A like decision was made by the same court, upholding the employers' liability law of Iowa, which has been in force in that state ever since 1862. *Railway Co.* v. *Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176. The Iowa statute is expressed in fewer words and better language than our own. It reads thus: 'Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corpora-

tion, in consequence of the neglect of agents or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission, of such agents, engineers, or other employes, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding.' Code Iowa, 1873, section 1307. Herrick was injured in Iowa by the negligence of a fellow-servant in the employ of said railroad company. He sued and recovered against the company on the Iowa statute in the state court of Minnesota, which judgment was affirmed in the supreme court of that state, upholding the constitutionality of the Iowa statute. *Herrick* v. *Railway Co.*, 31 Minn. 11, 16 N. W. 413; *Id.*, 32 Minn. 435, 21 N. W. 471. On appeal to the supreme court of the United States, the constitutionality of the Iowa statute was upheld on the authority of *Railway Co.* v. *Mackey*, *supra*, as above stated. Some 10 or 12 states of the Union have such acts on their statute books, and none of them have ever been held unconstitutional, while the following decisions of state supreme courts have held such legislation to be constitutional and valid: *McAunich* v. *Railroad Co.*, 20 Iowa 338; *Bucklew* v. *Railway Co.*, 64 Iowa 603, 21 N. W. 103; *Rose* v. *Railroad Co.*, 39 Iowa 246; *Railway Co.* v. *Peavey*, 29 Kan. 169; *Railway Co.* v. *Mackey*, 33 Kan. 298, 6 Pac. 291; *Herrick* v. *Railway Co.*, 31 Minn. 11, 16 N. W. 413; *Id.*, 32 Minn. 435, 21 N. W. 471; *Attorney General* v. *Railway Co.*, 35 Wis. 425; *Ditberner* v. *Railway Co.*, 47 Wis. 138, 2 N. W. 69. The questions decided by this court in *Townsend* v. *State*, 47 N. E. 19, are analogous to and on the same lines as the cases just cited.

"Appellant's learned counsel have urged upon our attention *Railroad Company* v. *Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, as probably declaring a different rule. The reference to that case is fortunate because, while it does not in the least depart from the rule laid down in the two cases above cited, it lays down some principles governing the subject, doubtless in mind in both of the other judgments of the federal supreme court, but not deemed necessary in these cases to be fully stated. In the course of the opinion, Mr. Justice Brewer, speaking for the court, said: "That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties, arising out of the peculiar business in which they are engaged, is

a just classification, and not one within the fourteenth amendment. Thus it is frequently required that they fence their tracks, and, as a penalty for failure to fence, double damages in case of loss are inflicted. *Railway Co.* v. *Humes*, 115 U. S. 512, 6 Sup. Ct. 110. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting on others; a duty which can be enforced by the legislature in any proper manner; and, whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state, and with a view to enforce just and reasonable police regulations. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids this. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear, not only that classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary selection.'

"Objection is made to the validity of the act because it embraces all corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that their business may not be peculiarly dangerous to life and limb, like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant, a railroad, can not be permitted to litigate the constitutionality of the act as to other corporations. *Henderson* v. *State*, 137 Ind. 552, 36 N. E. 257; *Board* v. *Reeves*, 148 Ind. 467, 46 N. E. 995; *Currier* v. *Elliott*, 141 Ind. 394, 39 N. E. 554. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question.

"It is also urged, as an objection to the validity of the act, that it exempts municipal corporations from its operation. But no reason has been suggested why municipal corporations should be classed with railroad corporations. We have many statutes applying to railroad corporations that do not apply to municipal corporations. There is no necessary similarity between them. Nor is the business of municipal corporations so peculiarly hazardous to their employes as to call for such special legislation as is called for in case of railroad corporations to protect their employes. We therefore conclude that the act does not violate the constitution, either federal or state."

It will be observed that all the words used in the fourth case, or clause, of the law, appear to relate to railway corporations. The first, second and third cases seem to be nothing more than a statutory declaration of a common law liability.

It already appears from the certificate itself that plaintiff in error, being a railroad employe, brought his action under the fourth clause. This clause is not dependent upon the first, second or third cases above it.

II.

The act being valid as to the railroad company, it can not question the constitutionality of the act as applied to others. Only those whose rights would be prejudiced by the enforcement of an unconstitutional act, provision or clause, will be heard to question its validity.

Brown v. *Ohio, etc., R. R. Co.*, 79 Fed. R. 176;
Pittsburg, etc., Co. v. *Montgomery*, 49 N. E. 587;
Wagner v. *Town of Garret*, 118 Ind., pp. 116–117;
Henderson v. *The State*, 137 Ind., pp. 564–5;
Board v. *Reeves*, 148 Ind. 476;
McKinney v. *State*, 30 Pac. R., p. 296;
Commonwealth v. *Wright*, 79 Ky. 22, s. c. 42 Am. R. 203;
Marshall v. *Donovan*, 10 Bush 681;
Wellington v *Petitioners*, 16 Pick. 96;
Norman v. *Boaz*, 4 S. W. 316;
Sinclair v. *Jackson*, 8 Cowen 543, 578;
Sheshane v. *Bailey*, 20 So. 360;
Black on Const. Law (2d ed.), p. 58;

Cooley Con. Lim. (6th ed.), p. 196;
State v. *Becker*, 51 N. W. 1023;
6 A. & E. Encyc. of Law (2d ed.) 1090, where the cases are well collected and arranged under note 1;
State v. *McNulty*, 73 N. W. 87.

III.

Statutes that are constitutional in part only will be upheld so far as they are not in conflict with the constitution, unless the prohibited parts are unseverable. A severance is easy in this case, if it should be thought that some other corporations might question its validity as to other clauses, which is not admitted, but denied.

Packet Co. v. *Keokuk*, 95 U. S. 80, 89;
Penniman's Case, 103 U. S. 716, 717;
Tiernan v. *Rinker*, 102 U. S. 123;
Kimmish v. *Ball*, 129 U. S. 217;
Henderson v. *State*, 137 Ind. 552, 564–5;
Field v. *Clark*, 143 U. S. 649–696;
Presser v. *Ill.*, 116 U. S. 263;
Cooley on Con. Lim. (6th ed.), p. 209;
People v. *Ill. St. Reformatory*, 36 N. E. 80;
Chicago, etc., v. *Jones*, 37 N. E. 254.

In the case last cited the supreme court of Illinois adopt the text of Judge Cooley, who said:

"The constitutional and unconstitutional provisions may even be contained in the same section and yet be perfectly distinct and separable, so that the first may stand, though the last fall. The point is not whether they are contained in the same section; for the distribution into sections is purely artificial; but whether they are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself and capable of being executed in accordance

with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. The difficulty is in determining whether the good and bad parts of the statute are capable of being separated within the meaning of this rule. If the statute attempts to accomplish two or more objects and is void as to one, it may still be in every respect complete and valid as to the other. But if its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion."

Const. Lim. (6th Ed.), p. 211.

In order to reach a discussion, the very learned counsel for the defendant in error must wage their attack from one of the two positions, viz:

1. That the fourteenth amendment prohibits a classification of corporations into (*a*) private, and (*b*) public or municipal corporations.

2. That the amendment prohibits a classification between corporations and natural persons.

As to the first: There is such a wide difference in the organization, purpose and operation between private and municipal bodies corporate that they have long formed separate topics for text-books. Municipal corporations as here used would seem to embrace the state and all of its governmental subdivisions—counties, cities, townships, road and school districts and so forth. The membership is not voluntary, but is imposed by laws for better government. These bodies politic may have persons engaged in their service, civil and military, but the relations of master, servant and fellow-servant can not be well said to exist.

As to the second: The business of the country is carried on by two very different classes of persons, viz: artificial persons, and natural persons. The one is the creature of and derives its power from the law; the other holds it as a natural right. They are treated

differently in very many things, as in taxation, in the kind and amount of property they may own, hold and convey, in making returns of their business public, in different liabilities and damages for their torts, in the time and manner of the payment of wages, and so forth.

Holden v. *Hardy*, 169 U. S. 366.

The relations between the employer and an employe are different as between these two classes. The natural person ordinarily (and always should) gives his personal attention to the safety of his servants. He sees them face to face. They see him. If they are injured by his fault, the damages fall directly upon him. A corporation can act only through agents. If by their fault the employe is injured or killed, the agent usually sustains no loss. It is not to be expected, therefore, that such agents will exercise that care for and control over the employes of another person, to wit, the corporation, as a natural person for his own. The conditions are different. The circumstances are not the same. The state is interested in the safety and welfare of the lives and limbs of its people. And it will add to the care which corporations themselves will take for the safety of their working people to provide that if one of the many, while in his proper place and doing his duty, is injured by another failing to do his duty, that the one injured may look to the corporation itself for redress. It will beget greater and proper care by the corporations, and be conducive to the public safety.

"The state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests."

Lauton v. *Steele*, 152 U. S. 136;
Holden v. *Hardy*, 169 U. S. 391–2.

It may, therefore, well classify, or rather follow the natural classification of employers, and say as to those corporate, they shall receive pay for injuries suffered at the hands of a negligent co-employe. We submit such a classification is not invalid under the equality clause of the fourteenth amendment.

This court has just said:

"What satisfies this equality has not been and probably never can be precisely defined. Generally, it has been said that it only requires the same means and methods to be applied impartially to *all the constituents of a class*, so that the law shall operate equally and uniformly upon all persons in similar circumstances. * * * It merely requires that *all persons subject to such legislation* shall be treated alike *under like circumstances and conditions.* * *

"The rule, therefore, is not a substitute for municipal law; it only prescribes that that law have the attribute of equality of operation —and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons *according to their relations.* In some circumstances it may not tax A. more than B., but if A. be of a different trade or profession than B. it may.

"And in matters not of taxation, if A. be a different kind of corporation than B. it may subject A. to a different rule of responsibility to servants than B. (*Mo. Pac. R. R.* v. *Mackey*, 127 U. S. 205), to a different measure of damages than B. (*Minn. & St. L. Ry. Co.* v. *Beckwith*, 129 U. S. 26), and it permits special legislation in all its varieties.

"In other words, the state may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

Magoun v. *Ill. T. & S. Bank*, 170 U. S., pp. 294–5.

Now, applying the above rule to the statute in hand, is it not apparent that the conditions and relations of a corporation towards the state, and also towards its employes, are not the same as that of a natural person.

Private corporations through the instrumentality of associated capital, mainly operate the large concerns of this country. The amount of dangerous machinery

and property in use and the number of persons employed in operating these are enormous. It is necessarily supervised and operated by agents who are not its owners, and, generally speaking, they are not able to respond in damages out of their own earnings for accidents and injuries suffered by those under their control. Again, care for others is measured by one's liability for their loss. It is not natural under these conditions to expect that a corporate overseer will use that care for those under his charge to which they are entitled for the safety of their lives and limbs.

And as the corporation, by the common law, is not liable for such want of care, it happens that thousands of worthy men, injured and crippled without their fault, are turned away remediless from the courts of justice.

In this age and time, where the employes in one concern number hundreds and thousands and tens of thousands, it is wholly impossible for each to be acquainted with the character and fitness of his fellows, without which it is not fair to say that he must sustain an injury suffered by the negligent act or conduct of each and all of these. In the old time, servants were few, and knew each other. Now the employes are, generally speaking, strangers to each other. They who aggregate so many together under corporate agencies owe them compensation for loss of life or limb, which naturally comes about under these conditions without their fault.

Government is progressive, and where the courts are bound fast by old, harsh or unjust rules, it is entirely proper that the legislature shall loosen the thrall and enlarge the rights and liabilities of persons so as to promote the public welfare and secure justice to large classes of citizens of the country.

This was doubtless the reason that prompted the legislature of Indiana, in its discretion, to make this act for the good of employes of corporations.

"And so long as there are reasonable grounds for believing that this is so, its decision upon this subject can not be reviewed by the federal courts."

Holden v. *Hardy*, 169 U. S., p. 395.

In conclusion, we beg to say, it does not seem to us that the question certified covers the entire statute, but only so much as relates to the case of the plaintiff in error; but should the court determine otherwise, then we submit the above in support of the view that the classification of the Indiana law was in the power of the legislature to make.

The plaintiff in error respectfully asks this honorable court to make answer to the court of appeals that, in so far as his case is concerned, at most, said act is not in violation of any clause of the federal constitution.

ADDISON C. HARRIS,

Attorney for Plaintiff in Error.

Indianapolis, October 1, 1898.

Office Supreme Court U. S.
FILED
DEC 19 1898
JAMES H. McKENNEY,
Clerk.

No. 292. Oct. Term, 1898.

Brf. of Harris for P. C. Con

Filed Dec. 19, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 292.

HOSEA B. TULLIS

v.

THE LAKE ERIE AND WESTERN RAILROAD COMPANY.

Brief in Response to the Petition for Certiorari.

ADDISON C. HARRIS,
Att'y for Plaintiff in Error.

C. E. Hollenbeck, Printer, Indianapolis.

IN THE

Supreme Court of the United States.

No. 292.

HOSEA B. TULLIS

v.

THE LAKE ERIE AND WESTERN RAILROAD COMPANY.

The appellant makes the following response to the motion to have the whole case certified into this court.

The petition shows:

1. A writ of error was allowed by the trial court July 10, 1897. Pet., p. 48.

2. That in the circuit court of appeals on January 21, 1898, and again on February 24, appellee filed motions to (1) dismiss the writ of error, and (2) strike from the record the bill of exceptions. *Vide*, pp. 7 and 8 of proceedings in the circuit court of appeals, printed at the end of the petition.

3. The case was heard on February 25, 1898. *Id.*, p. 9.

4. March 7, 1898, appellee filed cross errors. *Id.*, p. 13.

5. April 7, 1898, certificate issued herein. *Id.*, p. 14.

If the certificate is answered that the statute of Indiana is void, the case ends. If valid, then appellee seeks to have this court decide its motions to dismiss the writ of error and strike the bill of exceptions from the record.

Is this a question of "peculiar gravity and general importance?"

In *Forsyth* v. *Hammond*, 166 U. S., p. 514, it is said:

"We have declined to issue writs of *certiorari* in cases where, there being only a matter of private interest, there had been no final judgment in the court of appeals."

What is the question here? We submit it turns upon the practice under and the construction and application of rule 34, of the circuit court for the district of Indiana, which reads as follows:

"Rule 34. *Ordered*, That all motions, demurrers and exceptions hereafter filed must be supported by written or printed briefs, to be filed in duplicate with such motion, demurrer or exception. Failure to file such briefs shall be deemed a waiver of such motion, demurrer or exception. If oral argument is desired by the party, he shall request it at the time of filing his briefs. The adverse party shall have fifteen days after the briefs of the moving party are filed, in which to file answering briefs in duplicate.

"If such party desires an oral argument, it must be requested at the time of filing his briefs. When any motion, demurrer or exception is filed, accompanied by briefs, the clerk shall forthwith notify the adverse party thereof."

The motion for a new trial was filed at the same term the trial was had and judgment entered on the verdict.

Judge Baker certifies in the bill of exceptions:

"There is no rule of this court regulating the time within which motions for new trial shall be filed, or making any provision for, or in regard to such motion; nor is there any rule or custom or practice in regard to the time of the verdict for rendition of judgment thereon."

Trans., p. 45.

He also certifies the official stenographer reported the trial in full; and the court made no limitation as to time when the exceptions should be written out and presented for signature. *Id.*, p. 46.

He also certifies that the court was in session when the motion and briefs, in compliance with the rule, were filed in the clerk's office; that one copy of the brief was placed on file with the motion, and the other was properly served (on the defendant) for a new trial.

On the filing, the following record was made:

"Comes now the plaintiff by Langdon & Coffroth and A. C. Harris, his attorneys, and files his motion for a new trial herein, in the words and figures following, to wit:"

Trans., p. 16.

At the close of the trial term the court made this entry:

"November Term, 1896.

"Monday, May 3, 1897, before Hon. John H. Baker, judge.

"General continuance:

"Ordered by the court that all plaints and proceedings depending in said court, and not specially continued, be and the same are hereby continued until the next term of this court. And the court doth now adjourn until the first day of the next term thereof."

This was brought into the record by *certiorari*, and appears on pp. 9–12 of the proceedings in the circuit court of appeals herein.

On May 26 the defendant's attorneys, in compliance with rule 34, filed "an answering brief on the motion

for a new trial, in the clerk's office—and a copy was served on the plaintiff's attorneys." Trans., p. 46.

On June 1 following the motion was denied, exceptions allowed, and sixty (60) days given, and the bill signed and filed within the time.

The bill of exceptions was then tendered to the defendant's attorneys, who made certain amendments, and when the same was presented for signing they objected:

1. "That on the facts of the case" it was too late to sign a bill.

2. That it was also too late to sue out a writ of error.

It seems to be settled that the time limited for the writ of error does not begin to run until the motion for a new trial is denied.

Aspen Mining, etc., Co. v. *Billings*, 150 U. S. 31, 36;
Voorhees v. *Noye Mfg. Co.*, 151 U. S. 135;
Texas, etc., Ry. Co. v. *Murphy*, 111 U. S. 488;
Memphis v. *Brown*, 94 U. S. 715, 717;
Brocket v. *Brocket*, 2 How. 238.

Judge Taft so held in *Altenberg* v. *Grant*, 83 F. R. 980.

Since the adoption of rule 34 it will not be gainsaid that no motions or demurrers in law cases, or exceptions in equity cases, or briefs, are filed in open court, or in chambers, but in the clerk's office, who stamps the file marks, makes the entries and record of such filing, mails a copy of the pleading and brief to opposing counsel; who file in like manner an answering brief in duplicate, and the matter being thus prepared for decision the clerk takes the pleading and briefs to the judge.

This construction and practice is shown by the facts that on April 26, 1897, "the plaintiff *filed in the clerk's office*, the court being then in session, (the motion) and reasons for a new trial and written briefs, *in compliance with the rule*"; that "on May 26, 1897, the defendant's attorneys filed an answering brief on the motion for a new trial *in the clerk's office* * * *." Trans., p. 46.

And "neither party in their briefs (having) asked for an oral argument, *therefore* * * * the clerk brought to the judge in chambers the motion for a new trial with the briefs of attorneys * * *." *Id.*, p. 46.

At common law and under the state practice a motion for a new trial may be filed during the trial term. 1 R. S. Ind. 1894, section 638.

Will it be argued that the court might not have sustained the motion and set aside the judgment at the ensuing term?

The question then comes whether *in this case*, under these precise facts, the judge had power to allow a bill of exceptions when acting on a motion for a new trial.

This precise question has been decided several times in the affirmative.

In *Woods* v. *Linvall*, 48 F. R. 73, the case was tried at the January term, 1891, and judgment entered. During that term, a petition for new trial was filed. At the succeeding June term, the petition was argued and overruled and a bill of exceptions then signed, sealed and filed. The defendant objected to the allowance of the bill, because no order was entered at the January term expressly extending the time for filing the bill to the June term, nor any consent given that it might be filed. And on appeal appellee moved to strike out the bill of exceptions.

It will thus be seen the cases are parallel.
The court say:

"We are all agreed that the motion to strike out the bill of exceptions should be overruled. It is true that in several cases cited by counsel for defendant in error, to wit, *Walton* v. *U. S.*, 9 Wheat. 651, *Ex Parte Bradstreet*, 4 Peters 102, and *Muller* v. *Ehlers*, 91 U. S. 249, it was held in effect that, in the absence of an order of court extending the time, a bill of exceptions covering errors committed at the trial can not be allowed and filed (unless by consent of parties) after the term has expired at which the judgment was rendered. *But in none of these cases did the question arise whether a bill of exceptions may not be allowed and filed at the term when the motion for a new trial is finally acted on, even though such action is taken at a term subsequent to the entry of judgment; and that is the precise question which confronts us in the case at bar.* The authorities cited are either cases in which no motion for a new trial was filed, or in which the bill of exceptions was presented after the lapse of the term at which the motion for a new trial was overruled. According to well established principles, therefore, the judgments involved had become final at the term preceding that at which a bill of exceptions was tendered. Since the decision in *Rutherford* v. *Ins. Co.*, 1 F. R. 456, we believe the practice has been uniform in all the districts of this circuit, where the custom prevails of entering judgments immediately on rendition of verdict, to allow a bill of exceptions during the term at which the motion for a new trial is overruled, even though it happens to be a term subsequent to the entry of the judgment. This practice, according to our observation, has become so common that it may be termed a rule of procedure in this circuit. It is a convenient practice. It obviates the necessity of settling a bill of exceptions at the trial term, which is useless labor if the motion for a new trial is continued to and is sustained at the succeeding term. And in these days, when it is customary to take notes of trial proceedings in short-hand, the practice in question is not open to those objections formerly urged against it. We are of the opinion, therefore, that the practice which has hitherto obtained in many districts of the circuit should be upheld unless it is overborne by controlling authority, and we find no such authority. On the contrary, we think the rule requiring bills of exceptions to be filed at the term when judgment is rendered must be understood to mean the term when the judgment becomes final and by reason of its becoming final the court loses control of the record."

In other cases this rule has been restated.

Railway Co. v. *Russell*, 60 F. R. 501;
United States v. *Carr*, 61 F. R. 803.

In a very late case, decided by the supreme court of Michigan, the rule was stated to be:

"The writ of error is the *dernier ressort*, and judgment can not be said to be final so as to deprive the trial court of the power to act in the premises during the term in which the court disposes of a pending motion. In case, therefore, no motion for a new trial is made, the term within which a bill of exceptions must be settled, or the time extended in the first instance, is that within which the judgment is entered; but where a motion for a new trial is made within the time allowed by rule, or within the time allowed by the court, or by leave of the court, the term within which such bill of exceptions must be settled, or the time extended, must be deemed to be that in which such motion is finally determined."

Adrain Furniture Co. v. *Lenawee Circuit Judge*, 52 N. W. 615;
Greeley v. *Percival*, 21 Fla. 538;
Hearson v. *Graudine*, 87 Ill. 116;
People v. *Gary*, 105 Ill. 264;
Riddlesbarger v. *McDaniel*, 38 Mo. 139;
Givens v. *Van Studiford*, 86 Mo. 149;
Shreve v. *Cheeseman*, 69 F. R. 785;
Talbott v. *Press Co.*, 80 F. R. 567.

In *People* v. *Gary*, *supra*, a case was tried in the superior court of Cook county, in the absence of the defendant, and judgment rendered against him. During that term defendant filed a motion for a new trial, which remained undisposed of at the close of the term. At the next term the motion was overruled, appeal allowed and 20 days given to file a bill of exceptions. Within the time a bill was presented containing the evidence given on the trial of the cause.

Judge Gary refused to sign any bill containing the evidence given on the trial. Mandamus was brought to compel him to sign such bill, and was granted by the supreme court, saying:

"In the Evans case cited above it is said—A bill of exceptions "should be reduced to form, and signed, during the term in which "the cause is tried, except in cases where counsel consent or the "judge, by an entry on the record directs that it may be prepared in "vacation and signed *nunc pro tunc*."

"Of course what is meant by the expression—the term in which "the cause is tried—is the term at which final judgment is rendered "in the cause. It would be useless labor for a party to prepare a bill "of exceptions before the motion for a new trial had been passed "upon, as it could not be known whether the bill would be needed "until the final action of the court on the motion." (Page 270.)

In *United States* v. *Breitling*, 20 How. 252, Chief Justice Taney, forty years ago, refused to strike out a bill of exceptions signed by the circuit judge after the close of the term, saying:

"And it is always in the power of the court to suspend its own rules or to except a particular case from its operation whenever the purposes of justice require it."

Judge Woods, as practitioner and as judge on the state bench, and on the federal bench in the district of Indiana, is of course entirely familiar with the practice, in that court.

At most we submit that this point is not of peculiar gravity or general importance. It is otherwise, as to the question certified, viz: the constitutionality of the statute embraced in the certificate.

Respectfully submitted,

ADDISON C. HARRIS,
Att'y for Plaintiff in Error.

Indianapolis, Dec. 10, 1898.

In the Supreme Court of the United States.

No. 292.

OCTOBER TERM, 1898.

HOSEA B. TULLIS,
vs.
THE LAKE ERIE & WESTERN RAILOAD COMPANY.

To the Honorable, the Chief Justice and Associate Justices of said Court:

Your petitioner, the Lake Erie & Western Railroad Company respectfully shows to the Court:

1. In this case the Circuit Court of Appeals for the Seventh Circuit has certified to this Court for decision the question of the constitutionality of a certain statute of the State of Indiana, popularly known as the Employers' Liability Statute, approved March 4, 1893 (Acts of 1893, page 294), as more fully appears from said certificate in the words and figures following:

CERTIFICATE TO SUPREME COURT.

Before Woods, Jenkins and Showalter, Circuit Judges.

In this case, duly argued and submitted to this Court, there arises a question of law concerning which this Court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow-servant, for which the defendant in error is alleged to be responsible by force of an act of the Legislature of Indiana, approved by the Governor of the State, March 4, 1893. The first section of the act reads as follows:

"1. That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"*First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

"*Third.* Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, roundhouse, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws."

For the entire act reference is made to the Session Laws of 1893, page 294. Burns' Annotated Indiana Statutes, revision of 1894, paragraphs 7083 to 7087, inclusive.

The Lake Erie & Western Railroad Company is a corporation of the State of Illinois owning and operating a railroad extending from Peoria, Illinois, into and through the State of Indiana. It is contended that the statute referred to is invalid because inconsistent with the fourteenth amendment of the Constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this Court is that material error was committed at the trial for which the judgment below should be reversed if the statute

mentioned is valid, and that if the statute mentioned is invalid the judgment should be affirmed. The question whether that statute is valid, or violates the fourteenth amendment of the Constitution of the United States the Court hereby orders certified and submitted to the Supreme Court of the United States for its proper decision.

WM. A. WOODS,
JAS. G. JENKINS,
JOHN W. SHOWALTER.

Your petitioner further shows that in the record of said case in the Circuit Court of Appeals, it appears,

1. That the verdict in said case was rendered on the 20th day of November, 1896, for the defendant, being at the November term, 1896.

2. That on the 23d day of November, 1896, at the same term, on defendant's motion, judgment for costs was rendered on said verdict in favor of defendant.

3. That on the 26th day of April, 1897, at the same term, plaintiff without calling the attention of the Court to the same filed in the Clerk's office his motion for a new trial, with written reasons therefor.

4. That on the first day of June, 1897, being at the May term, 1897, said motion was overruled by the Court, plaintiff excepting, and sixty days were given plaintiff to file his bill of exceptions.

5. The facts touching the rendition of the verdict and all proceedings subsequent thereto in the Circuit Court are shown by the following, being the last two pages of the bill of exceptions, as the same is found in the transcript of the proceedings of the Circuit Court hereto attached, at page 45, as follows, to wit:

"And thereupon the jury again retired, and after further deliberations, returned into court their verdict for the defendant.

"Be it further known, that the verdict as appears by the record was rendered in this cause on November 21, 1896, and judgment was entered thereon on November 23, following.

"There is no rule of this court regulating the time within which motions for new trials shall be filed, or making any provision for, or in regard to such motion; nor is there any rule or custom or practice in regard to the time after verdict for rendition of judgment thereon.

"On September 27, 1892, the Circuit Court of the United States for the District of Indiana adopted the following rule:

"'Rule 34. *Ordered*, That all motions, demurrers and exceptions hereafter filed must be supported by written or printed briefs, to be filed in duplicate with such motion, demurrer or exception. Failure to file such briefs shall be deemed a waiver of such motion, demurrer or exception. If oral argument is desired by the party, he shall request it at the time of filing his briefs. The adverse party shall have fifteen days after the briefs of the moving party are filed, in which to file answering briefs in duplicate.

"'If such party desires an oral argument, if must be requested at the time of filing his briefs. When any motion, demurrer or exception is filed, accompanied by briefs, the clerk shall forthwith notify the adverse party thereof.'

"After the rendition of the judgment, no further action was had at the November term, 1896, until April 26, 1897, when the plaintiff filed in the Clerk's office, the court being then in session, his motion and reasons for a new trial, and written briefs in compliance with the rule, one copy of which was placed on file with the motion and the other was properly served upon the defendant's attorneys, but this motion for a new trial, or the fact that it had been filed or attempted to be filed in the Clerk's office was not brought to the notice of the Court or the Judge thereof until on or about the 26th day of May, 1897, and after the November term of court had expired. The plaintiff's attorneys filed the motion and a brief in the Clerk's office, and the entry was made as appears of record. The motion was not ruled on at that term, nor was any time asked or given by special order or otherwise beyond the term to file a bill of exceptions, nor was any stay of judgment asked or given with a view to further proceedings.

"During the trial all the proceedings were reported by the official stenographer; exceptions were taken from time to time and allowed, and no limitation was made by the Court in allowing an exception as to the time when the exceptions should be written out and presented for signature.

"On May 26, 1897, the defendant's attorneys filed an answering brief on the motion for a new trial, in the Clerk's office, and a copy was served on the plaintiff's attorneys.

"Neither party in their briefs asked for an oral argument, and therefore on the day defendant's attorneys filed their brief, or very shortly afterwards, the Clerk brought to the Judge in chambers the motion for a new trial, with the briefs of attorneys, this being the first notice to the Court or Judge of the existence of such motion; and the said motion was overruled June 1, 1897, exceptions allowed and sixty days given in which to file a bill of exceptions, at the request of plaintiff's attorney, but with the statement to him at the time in the opinion of the Judge such exception and bill would be of no avail to raise any question of error.

"Shortly afterwards, and during the early part of June, plaintiff's attorneys prepared a bill of exceptions and served a copy on defendant's attorneys.

"Certain amendments were made thereto by the defendant's attorneys which were accepted by the plaintiff's attorneys. Thereupon they presented the bill of exceptions for signature.

"The defendant's attorneys object to the Judge signing the bill of exceptions on two grounds:

"*First.* That on the facts of the case it is now too late, and the Court has no power to sign a bill of exceptions.

"Plaintiff's attorneys insist that in this case it is presented in due time.

"*Second.* The defendant's attorneys further insist that it is now too late to take or sue a writ of error, as more than six months have elapsed since the entry of the judgment on the 23d day of November, 1896; while plaintiff's attorneys insist that it is within the time, as it should be computed from the overruling of the motion for a new trial.

"The Court, therefore, deems it best that the foregoing statement should be embodied in the bill of exceptions. And now, within said time, the plaintiff presents this his bill of exceptions, which is examined and found to be a full, true and correct bill of exceptions, and the same is allowed and signed by said Judge presiding in said court, and the same is made a part of the records of said court in said cause.

"JOHN H. BAKER,

"July 10, 1897. *Judge.*"

And the following showing the petition for the writ of error and its allowance:

"PETITION FOR WRIT OF ERROR.

"Now comes Hosea B. Tullis, plaintiff herein, and says that heretofore, to wit, on the 23d day of November, 1896, this Court entered judgment herein in favor of the defendant and against this plaintiff, and overruled his motion for a new trial on June 1, 1897; in which judgment and the proceedings, and prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which more in detail appear from the assignment of errors, which is filed with this petition.

"Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Circuit Court of Appeals for the Seventh Circuit, for the correction of errors so

complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

"HOSEA B. TULLIS.

"LANGDON & COFFROTH,
"A. C. HARRIS,
"*Attorneys for Plaintiff.*

"Allowed this 10th day of July, 1897, over the objection and exception of the defendant.

"JOHN H. BAKER,
"*Judge.*"

Petitioner further shows that in the Circuit Court of Appeals it moved to dismiss the writ of error and to strike out the bill of exceptions, because neither was taken in due time. But your petitioner shows that in certifying the constitutional question to this court for decision, the Circuit Court of Appeals has held that the bill of exceptions was taken and the writ of error was sued out in due time, notwithstanding the fact, undisputed, that said bill of exceptions was neither filed nor tendered at the term at which the judgment was rendered, nor until nearly eight months after such judgment; and notwithstanding the motion for a new trial was not filed until April 26, 1897, five months and three days after the judgment was rendered, and notwithstanding it was not brought to the attention of the Court, nor did the Court know such motion had been filed until May 26, 1897, six months and three days after judgment, and notwithstanding no leave was given beyond the trial term to file a bill of exceptions, and the same was not filed till July 10, 1897, nor tendered until the early part of June of the same year, and notwithstanding the writ of error was not sued out until July 10, 1897.

Your petitioner further shows that the statute of limitation as to such appeals by the judiciary, act of 1891, reads as follows:

"Section 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals, under the provisions of this act, shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."

That it has been held that when a motion for a new trial or a petition for a rehearing has been seasonably presented to and entertained by the Court, the effect of such presentation and consideration is to suspend the running of the limitation pending such consideration.

But it is submitted that, in no case has such latitude of construction been given to the limitation either as to filing bills of exceptions or suing out writs of error, as in the case at bar; that the effect of the construction here given is to wholly unsettle the practice as to bills of exceptions and to make the limitation as to writs of error nearly twelve, instead of six months, in direct violation of the plainly expressed will of Congress. The result is, in every case instead of a certain and definite rule of limitation, we will have such a varying limitation as may meet the views of the Court in that case.

Your petitioner presents herewith a correct transcript of the entire record of this case, both in the Circuit Court and the Circuit Court of Appeals.

Wherefore your petitioner prays the Court to order this entire case to be certified to this court for hearing and decision, to the end that this question of practice may be settled authoritatively and a uniform rule established, and your petitioner will ever pray, etc.

And petitioner files a brief in support of this petition.

Respectfully submitted,

JOHN B COCKRUM,
W. H. H. MILLER and
JOHN B. ELAM,
Attorneys for Petitioner.

PROCEEDINGS IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

455

HOSEA B. TULLIS, PLAINTIFF IN ERROR,

vs.

LAKE ERIE AND WESTERN RAILROAD COMPANY, DEFENDANT IN ERROR.

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At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held at the United States Court Room, in the city of Chicago, on Monday, the fifth day of October, 1896, of the October term, in the year of our Lord one thousand eight hundred and ninety-six, and of our independence the one hundred and twenty-first.

And afterwards, to wit: On the twentieth day of September, 1897, in the October term aforesaid, came the defendant in error by its counsel, Mr. John B. Cockrum, Mr. W. H. H. Miller and Mr. John B. Elam, and filed their special appearance in the office of the Clerk of said court, said special appearance being in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 455. October Term, 1896.

HOSEA B. TULLIS,
Plaintiff in Error,

v.

THE LAKE ERIE & WESTERN RAILROAD COMPANY.

The Clerk will enter my special appearance as counsel for the defendant in error, for the purpose of moving, strike out bill of exceptions and dismissing the writ of error.

JOHN B. COCKRUM,
W. H. H. MILLER,
JOHN B. ELAM.

Note.—Must be signed by a member of the bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual, and not firm names, must be signed.

Endorsed: Filed Sep. 20, 1897.

OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the twenty-seventh day of September, 1897, in the October term aforesaid, came the plaintiff in error by his counsel, Mr. A. C. Harris, Mr. B. W. Langdon and Mr. U. R. Coffroth, and filed in the office of the Clerk of said court their appearance, said appearance being in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 455. October Term, 1896.

HOSEA B. TULLIS,
Plaintiff in Error,

v.

THE LAKE ERIE & WESTERN RAILROAD COMPANY.

The Clerk will enter my appearance as counsel for the appellant.

A. C. HARRIS,
B. W. LANGDON,
U. R. COFFROTH.

Note.—Must be signed by a member of the bar of the United States Circuit Court of Appeals for the Seventh Circuit. Individual, and not firm names, must be signed.

Endorsed: Filed Sep. 27, 1897.

OLIVER T. MORTON, *Clerk.*

At a regular term of the United States Circuit Court of Appeals, for the Seventh Circuit, begun and held at the United States court room, in the city of Chicago, on Monday, the fourth day of October, 1897, of the October term, in the year of our Lord one thousand eight hundred and ninety-seven, and of our independence the one hundred and twenty-second.

And afterwards, to wit: On the twentieth day of December, 1897, in the October term last aforesaid, there was filed in the office of the Clerk of said court a stipulation in said cause, said stipulation being in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

HOSEA B. TULLIS, *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455. Stipulation as to filing briefs.

It is hereby stipulated that the appellant shall have until the first day of January, 1898, to file his brief, and the appellee until the fifteenth day of February, 1898.

A. C. HARRIS,
Attorney for Appellant.
MILLER & ELAM,
Attorneys for Appellee.

Endorsed: Filed December 20, 1897.
OLIVER T. MORTON, *Clerk.*

And afterward, on the same day, to wit: On the twentieth day of December, 1897, in the October term last aforesaid, in the record of proceedings in said entitled cause, appears the following entry, to wit:

MONDAY, December 20, 1897.

Before Hon. William A. Woods, Circuit Judge.

HOSEA B. TULLIS *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

Upon filing of stipulation of counsel, it is ordered by the Court that the time for filing brief of plaintiff in error in this cause, be, and the same is hereby, extended to January 1, 1898, and that the time for filing of brief for defendant in error be, and the same is hereby extended to February 18, 1898.

And afterwards, to wit: On the third day of January, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

MONDAY, January 3, 1898.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

HOSEA B. TULLIS, *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

It is now here ordered that this cause be, and the same is hereby set down for hearing, Thursday, January 20, 1898.

And afterwards, to wit: On the 5th day of January, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

WEDNESDAY, January 5, 1898.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

HOSEA B. TULLIS, *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

It is ordered by the Court that this cause be, and the same is, hereby reset down for hearing, February 25, 1898.

And afterwards, to wit: On the 21st day of January, 1898, in the October term last aforesaid, came the defendant in error, by its counsel, Mr. John B. Cockrum, Mr. W. H. H.

Miller and Mr. John B. Elam, and filed its motion to dismiss writ of error or to strike out bill of exceptions, said motion being in the words and figures following, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS.

SEVENTH CIRCUIT.

October Term, 1897.

HOSEA B. TULLIS
vs.
THE LAKE ERIE & WESTERN RAILROAD COMPANY. } No. 455.

MOTION.

The defendant in error, specially appearing for that purpose only, moves the Court:

First. To dismiss this writ of error because the same was not taken within six months after the entry of the judgment.

Second. If the writ of error is not dismissed, then defendant in error moves to strike from the record the bill of exceptions, because the same was not presented or filed at the trial term, nor until nearly eight months after the judgment was entered.

JOHN B. COCKRUM,
W. H. H. MILLER AND
JOHN B. ELAM,
Attorneys for Defendant in Error.

Endorsed: Filed January 21, 1898.
OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the twenty fourth day of February, 1898, in the October term last aforesaid, came the defendant in error by its counsel, Mr. John B. Cockrum, Mr. W. H. H. Miller and Mr. John B. Elam, and filed its supplementary motion to dismiss writ of error in the office of the Clerk of said court, said supplementary motion being in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,
SEVENTH CIRCUIT.

HOSEA B. TULLIS *vs.* LAKE ERIE & WESTERN RAILROAD COMPANY.	No. 455.

SUPPLEMENTARY MOTION TO DISMISS WRIT OF ERROR.

The defendant in error moves to dismiss this writ of error for the further reason:

That this Court has no jurisdiction of appeal because the action of the plaintiff depends solely on the act of the Legislature of Indiana of 1893 (Act 1893, page 294; R. S. 1894, section 7083), making the master liable to an employe for the acts of a co-employe, the validity of which act is challenged and denied by defendant as a violation of the fourteenth amendment to the Federal Constitution.

The act is a denial to the defendant of the equal protection of the law, in that while some "persons" are exempt from liability to one employe by reason of the negligence of a co-employe, others, including defendant, under the same conditions are denied such exemption.

Under these circumstances the right of review is in the Supreme, not in this Court.

Supplement to Revised Statutes U. S., page 903, section 5.

The case involves:

1. The construction and application of the Constitution of the United States.

2. The law of the State is claimed to be in contravention of the Constitution of the United States.

The case is, therefore, clearly one of which, if this question has to be decided, the Supreme Court has exclusive jurisdiction.

City of Indianapolis *vs.* Central Trust Co., 83 Fed. Rep. 529.

The argument against the constitutionality of this statute is in our brief on the merits on file in this case.

JOHN B. COCKRUM,
W. H. H. MILLER,
JOHN B. ELAM,
Attorneys for Defendant in Error.

Endorsed: Filed February 24, 1898.
OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the twenty-fifth day of February, 1898, in the October term aforesaid, the following further proceedings, were had and entered of record, to wit:

FRIDAY, February 25, 1898.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

HOSEA B. TULLIS
vs.
LAKE ERIE & WESTERN RAILROAD COMPANY.
} No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

Now this day came the parties by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel, and on oral argument by Mr. Addison C. Harris, counsel for plaintiff in error, and by Mr. W. H. H. Miller, counsel for defendant in error, and the Court having heard the same, takes this matter under advisement.

And afterward, to wit: On the twenty-sixth day of February, 1898, in the October term aforesaid, came the plaintiff in error, by his counsel, Mr. Addison C. Harris, and filed in the office of the Clerk of said court, his motion for a writ of certiorari, which said motion was in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

HOSEA B. TULLIS, *Plaintiff in Error*,
vs.
LAKE ERIE & WESTERN RAILROAD COMPANY, *Defendant in Error.*
} Motion for Certiorari.

Hosea B. Tullis, the plaintiff in error, respectfully shows unto the Court that at the close of the November term, 1896, of the

Circuit Court of the United States for the District of Indiana, the Court made an order adjourning all pleas, plaints and proceedings of every kind whatsoever, undetermined, over into the succeeding term, to wit: The term beginning the first Tuesday in May, 1897. That it is material and necessary to the understanding of this case on appeal that said adjourning order should be made and be a part of the record herein. That the Clerk of the said Circuit Court omitted and failed to certify said adjourning order as a part of the record by him certified into this court in said cause.

Wherefore, the said plaintiff in error moves the Court to make proper order upon the Clerk of said Circuit Court, with due speed, to certify said adjourning order into this court that the same may be made a part of the record herein.

Respectfully submitted,

HOSEA B. TULLIS,
By A. C. HARRIS.

STATE OF ILLINOIS, }
COOK COUNTY. } ss:

Addison C. Harris, being duly sworn upon his oath, says that he is the attorney for the plaintiff in error and makes this affidavit for and in his behalf and that the matters set forth in the said motion and petition are true as he verily believes.

A. C. HARRIS.

Subscribed and sworn to before me this
(SEAL) 26th day of February, A. D. 1898.

OLIVER T. MORTON,
Clerk U. S. Circuit Court of Appeals for the Seventh Circuit.

Endorsed: Filed February 26, 1898.
OLIVER T. MORTON, *Clerk.*

And afterwards, on the same day, to wit: On the 26th day of February, 1898, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

SATURDAY, FEBRUARY 26, 1898.

Before Hon. William A. Woods, Circuit Judge; Hon. James G. Jenkins, Circuit Judge; Hon. John W. Showalter, Circuit Judge.

HOSEA B. TULLIS
vs.
LAKE ERIE & WESTERN RAILROAD COMPANY.
} No. 455.

In error to the Circuit Court of the United States for the District of Indiana.

Upon the reading and filing of affidavit, and upon motion of Mr. Addison C. Harris, counsel for plaintiff in error, that writ of certiorari issue in this cause directed to the Clerk of the Circuit Court of the United States for the District of Indiana, it is now here ordered that writ of certiorari issue forthwith.

And afterwards, on the same day, to wit: On the twenty-sixth day of February, 1898, in the October term last aforesaid, there was issued out of and under the seal of the United States Circuit Court of Appeals a writ of certiorari directed to the Clerk of the Circuit Court of the United States for the District of Indiana, said writ of certiorari being in the words and figures following, to wit:

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the Honorable Judges of the Circuit Court of the United States for the District of Indiana, greeting:

Whereas, in a certain suit in said Circuit Court of the United States for the District of Indiana, between Hosea B. Tullis, plaintiff, and the Lake Erie & Western Railroad Company, defendant, which suit was removed to the United States Circuit Court of Appeals for the Seventh Circuit, by virtue of a writ of error agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested that the following, which is of record in said Circuit Court, is omitted from said transcript:

An order of the Circuit Court of the United States for the District of Indiana, entered at the close of the November term,

1896, adjourning all pleas, plaints and proceedings of every kind whatsoever, undetermined, over and into the succeeding term, to wit: The term beginning the first Tuesday in May, 1897.

You are therefore and hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said United States Circuit Court of Appeals for the Seventh Circuit, so that you have the same, together with this writ, before the said United States Circuit Court of Appeals for the Seventh Circuit forthwith.

WITNESS THE HONORABLE MELVILLE W. FULLER, Chief Justice of the United States, the twenty-sixth day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, to wit: On the first day of March, 1898, in the October term last aforesaid, there was filed in the office of the Clerk of said court the return to the writ of certiorari, which said return was in the words and figures following, to wit:

In the Circuit Court of the United States for the District of Indiana.

November Term, 1896, Monday, May 3, 1897, before Honorable John H. Baker, Judge.

General Continuance:

Ordered by the Court that all plaints and proceedings depending in said court, and not specially continued, be, and the same are hereby, continued until the next term of this court.

And the court doth now adjourn until the first day of the next term thereof.

UNITED STATES OF AMERICA, DISTRICT OF INDIANA, } ss:

I, Noble C. Butler, Clerk of the Circuit Court of the United States within and for said District, do hereby certify that the above and foregoing are full and true copies of the general continuance and adjourning order made and entered in said court

on the 3d day of May, 1897, as fully as the same appear upon the records now in my office.

Witness my hand and the seal of said court at In-
(Seal.) dianapolis, in said District, this 28th day of February, A. D., 1898.

NOBLE C. BUTLER, *Clerk.*

Endorsed: Filed March 1, 1898.

OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the 7th day of March, 1898, in the October term last aforesaid, came the defendant in error, by its counsel, Mr. John B. Cockrum, Mr. W. H. H. Miller and Mr. John B. Elam, and filed in the office of the Clerk of said court its assignment of cross-errors, which said assignment was in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

October Term, 1897.

HOSEA B. TULLIS	
vs.	No. 455.
LAKE ERIE & WESTERN RAILROAD COMPANY.	

ASSIGNMENT OF CROSS-ERRORS.

The defendant in error, the Lake Erie & Western Railroad Company, comes, asks leave to file an assignment of cross-errors, and, leave being given, assigns cross-errors on the record in this case in this, to wit:

That the trial court erred in overruling its demurrer to the second paragraph of the complaint herein, to which ruling the defendant at the time excepted. See transcript, page 14.

JOHN B. COCKRUM,
W. H. H. MILLER,
JOHN B. ELAM.
Attorneys for Defendant in Error.

Endorsed: Filed March 7, 1898.

OLIVER T. MORTON, *Clerk.*

And afterwards, to wit: On the 7th day of April, 1898, in the October term last aforesaid, there was filed in the office of the Clerk of said court the certificate of the court to the Supreme Court of the United States, said certificate being in the words and figures following, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SEVENTH CIRCUIT.

No. 455—January Session, A. D. 1898.

HOSEA B. TULLIS, *Plaintiff in error,* *vs.* THE LAKE ERIE & WESTERN RAILROAD COMPANY.	Error to the Circuit Court of the United States for the District of Indiana

CERTIFICATE TO SUPREME COURT.

Before WOODS, JENKINS and SHOWALTER, *Circuit Judges.*

In this case, duly argued and submitted to this Court, there arises a question of law concerning which this Court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow servant, for which the defendant in error is alleged to be responsible by force of an act of the Legislature of Indiana approved by the Governor of the State March 4, 1893. The first section of the act reads as follows:

"1. That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"*First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when

such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

"*Third.* Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws."

For the entire act reference is made to Session Laws of 1893, page 294, Burns' Annotated Indiana Statutes, Revision of 1894, paragraphs 7083 to 7087 inclusive.

The Lake Erie & Western Railroad Company is a corporation of the State of Illinois owning and operating a railroad extending from Peoria, Illinois, into and through the State of Indiana. It is contended that the statute referred to is invalid because inconsistent with the fourteenth amendment of the constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this Court is that material error was committed at the trial for which the judgment below should be reversed if the statute mentioned is valid, and that if the statute mentioned is invalid

the judgment should be affirmed. The question whether that statute is valid or violates the fourteenth amendment of the constitution of the United States the court hereby orders certified and submitted to the Supreme Court of the United States for its proper decision.

WM. A. WOODS,
JAS. G. JENKINS,
JOHN W. SHOWALTER.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

I, Oliver T. Morton, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 18, inclusive, contain a true copy of the proceedings in the United States Circuit Court of Appeals for the Seventh Circuit, in the case of Hosea B. Tullis vs. The Lake Erie & Western Railroad Company, No. 455, October Term, 1896, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Seventh Circuit.

United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the city of Chicago, this sixth day of October, A. D. 1898.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

No. 292. J.
Original
Office Supreme Court U. S.
FILED
NOV 9 1898
JAMES H. McKENNEY,
CLERK
Brief of Miller & Elam for Pl
Filed Nov. 9, 1898.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

No. 292.

HOSEA B. TULLIS

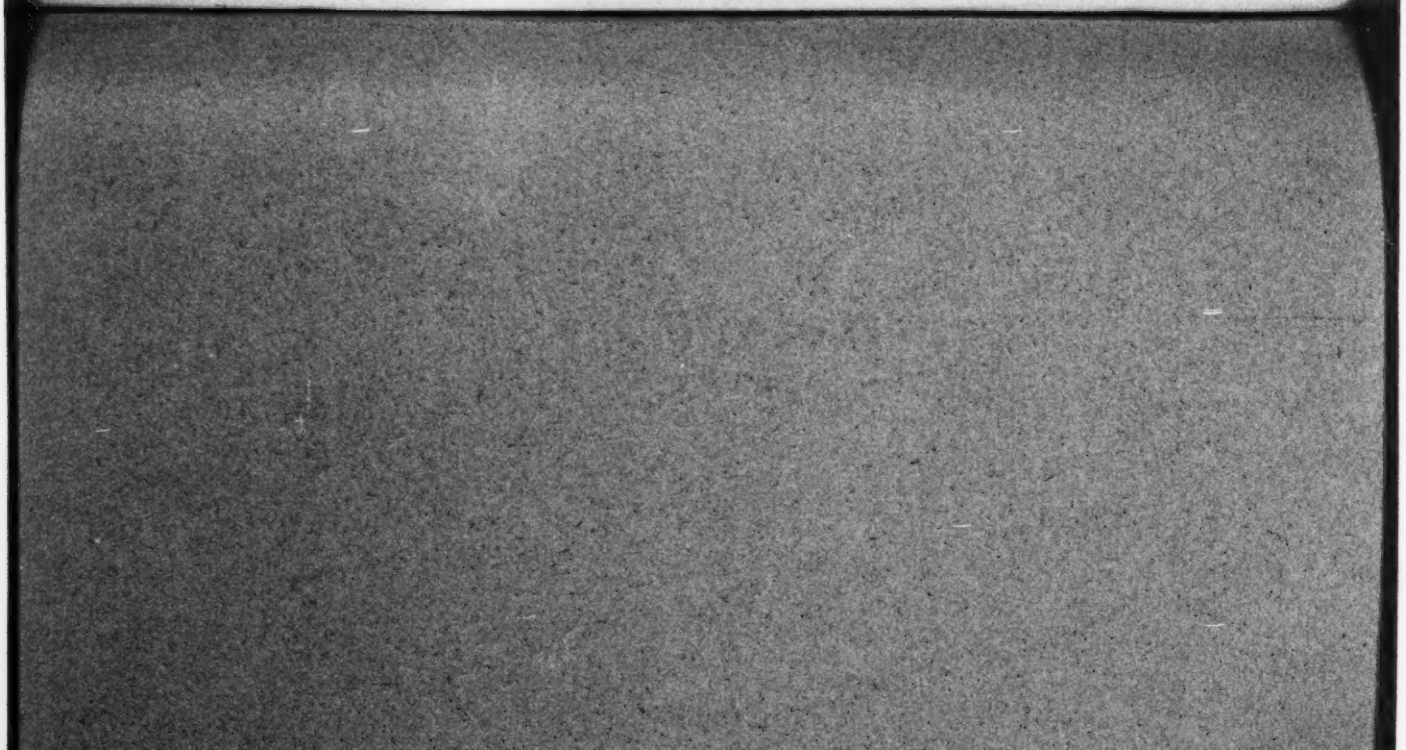
vs.

THE LAKE ERIE & WESTERN RAILROAD COMPANY.

BRIEF UPON PETITION TO HAVE ENTIRE CASE BROUGHT FROM CIRCUIT COURT OF APPEALS TO THE SUPREME COURT.

JOHN B. COCKRUM,
W. H. H. MILLER AND
JOHN B. ELAM,
Attorneys for Defendant in Error.

WM. B. BURFORD, PRINTER, INDIANAPOLIS.



IN THE

Supreme Court of the United States

No. 292.

OCTOBER TERM, 1898.

HOSEA B. TULLIS
vs.
THE LAKE ERIE & WESTERN RAILROAD COMPANY.

BRIEF UPON PETITION TO HAVE ENTIRE CASE BROUGHT FROM CIRCUIT COURT OF APPEALS TO THE SUPREME COURT.

The judges of the Circuit Court of Appeals have certified to this Court for decision the question whether the act, known as the Employers' Liability Act of the State of Indiana, is in violation of the Fourteenth Amendment of the Federal Constitution. The defendant in error has filed in this court its petition asking that the entire case be brought to this court for decision, in order that it may have the opinion of this Court as to whether the bill of exceptions was filed, and the writ of error sued out, in due time.

To the end that this Court may have all questions fully presented, the defendant in error has printed and filed with its petition a full transcript of the record in the Circuit Court and in the Circuit Court of Appeals. The petition, the record in the Circuit Court, and the record in the Circuit Court of Appeals, are under the same cover and in the order named. In the petition (Transcript, p. iii) it appears:

First. That the verdict in the case was rendered on the 20th day of November, 1896, for the defendant, being at the November Term, 1896.

Second. That two days later, on defendant's motion, judgment was rendered on the verdict for costs.

Third. That on the 26th day of April, 1897, over five months thereafter, and almost at the end of the term, plaintiff, without calling the attention of the Court to the same, filed in the clerk's office his motion for a new trial.

Fourth. That on the first day of June, 1897, at the next term, said motion was overruled by the Court, plaintiff excepting, and sixty days were given in which to file his bill of exceptions.

The bill of exceptions so far as pertinent appears at pages iii, iv and v of the petition, and shows:

First. That there is no rule of court prescribing the time within which mot ons for new trial must be made, nor is there any rule, custom or practice as to the time after verdict for the rendition of judgment thereon.

Second. That there is a rule of court requiring motions to be supported by written or printed briefs within fifteen days and requiring the adverse party to file briefs within a like time.

Third. That plaintiff did nothing after the rendition of the verdict, November 20th, until April 26th, when the motion for a new trial with a brief was filed and a copy thereof sent to defendant's attorneys. That the filing of this motion was not called to the attention of the Court until the 26th day of May, 1897, after the term of court at which the verdict was rendered had expired. That at that time the matter of the motion was brought to the attention of the judge by the clerk bringing to him in chambers the motion and the briefs for and against the same. That on June 1st the motion was overruled, plaintiff excepted, and was allowed sixty days in which to file his bill; the judge, however, stating at the time to plaintiff's attorney that he thought the bill would be of no value to raise any question of error.

Fourth. That shortly afterwards plaintiff's attorney prepared a bill of exceptions and served a copy of the same on defendant's attorneys. That defendant's attorneys objected to the signing of the bill upon two grounds:

(1) Because it was too late and the Court had no power to sign the bill.

(2) Because it was too late to sue out a writ of error, more than six months having elapsed since the entry of judgment.

The record, p. 7 (C. C. A.), further shows that defendant in due time in the Circuit Court of Appeals moved to dismiss the writ of error and strike out the bill of exceptions because neither was taken in due time. But while these motions have not been formally acted upon by the Circuit Court of Appeals, the certificate upon the constitutional question sent to this court shows that these motions have not been sustained, but that the Circuit Court of Appeals has entertained jurisdiction to decide the case upon the merits.

ARGUMENT.

I.

The statute of limitations as to such appeals and writs of error in the Judiciary Act of 1891 reads as follows:

> "Section 11. That no appeal or writ of error by which any order, judgment or decree may be reviewed in the Circuit Court of Appeals under the provisions of this Act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."
>
> 1st Supplement R. S., page 904.

We are aware that it has been held that when a motion for a new trial at law, or a petition for a rehearing in chancery, has been seasonably presented to and entertained by the Court, the effect of such presentation and consideration is to suspend the running of the limitation pending such consideration.

Our contention here, however, is that in this case the Circuit Court of Appeals for the Seventh Circuit has gone further than any other court has ever gone, further than the decisions of this Court warrant; in fact, has gone so far as practically to amend Section 11 and make the limitation, at the option of the appealing party and with the permission of the trial court, twelve months or more instead of six months. If a verdict and judgment rendered the first week of the November term may be suspended by a motion for a

new trial filed, though not called to the attention of the Court, in the last week of the term, and such motion relating back, is operative to suspend the statute of limitations during all of the time before it was filed, it of course would be operative also to suspend such limitation for any length of time before it was finally passed upon after its filing, with the result that the limitation as before stated is practically what the party and the judge choose to make it. It is submitted, that, neither in the decisions of this Court nor of the other Circuit Courts of Appeals is there any warrant for such decision.

It is submitted that in all of the decisions which hold that the motion for a new trial or a petition for a rehearing suspends the operation of the statute an element is named which is entirely wanting here, namely, a *seasonable* filing and *presentation* of such motion or petition, and the entertainment thereof by the Court during the trial term.

And right here we find the warrant for presenting this petition to this Court. Nothing can be more important in the administration of the federal courts than that the practice in a matter of this kind shall be uniform, and shall not be dependent upon the varying circumstances of each case, or the varying views of the judges sitting in the various Circuit Courts of Appeals. With nine courts of last resort making and publishing federal decisions, a failure by this Court to exercise, in the interest of uniformity, freely and vigorously, the power reserved by the statute to bring cases here involving conflicting views of practice, would soon result in disastrous confusion. Doubtless it was the apprehension of such a result that caused Congress to give this Court power by certiorari to exercise a salutary supervision over all decisions in the Circuit Courts of Appeals.

As an illustration of the necessity for this Court to maintain a strict supervision of the decisions of the Circuit Courts of Appeals, we call attention to the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of the Western Union Telegraph Company v. Baker, 85 Fed. Rep. 690. In that case the question was whether exceptions to the instructions given by the Court to the jury were taken in due time. It was, as in the case at bar, strictly a question of practice. In the opinion, page 691, it is said:

"It is stated in the record that all the exceptions were taken in writing after the jury had retired to deliberate upon their verdict, *and before the rendition of their verdict*, for the reason that this court refused in all cases to allow exceptions to be taken in the presence of the jury, *and would not have allowed exceptions to be taken in this case had it been asked*, but no request was made by either party to take such exceptions before the jury retired."

In other words, the record showed that the exceptions could not be taken before the retirement of the jury, because the trial court would not permit it, and the taking of them after the retirement of the jury was useless because the Circuit Court of Appeals refused to consider them. Elsewhere in the same opinion it is stated that "this position is sustained we believe by every court to which the question has been presented," and a number of decisions of Circuit Courts of Appeals are cited, some of which apparently do, and others do not, sustain that decision.

One of the cases so cited and which does apparently sustain the decision is Bracken v. Union Pacific, etc., 56 Fed. Rep. 447, a decision by the Circuit Court of Appeals of the Eighth Circuit. In that case, on page 450, it is said:

"The bill of exceptions states that the defendant's attorney gave notice in court that he desired to have exceptions noted to the charge of the court and to certain portions of the same, but not in the presence of the jury nor until after the jury had retired to consider the verdict. Exceptions taken to the charge of the court after the jury had retired to consider their verdict will not be considered by this court. Price v. Pankhurst, 53 Fed. Rep. 312."

But with all due respect, it is submitted that in neither of these cases is the rule correctly stated. Nor has any such statement the sanction of this Court, nor does the reason upon which the rule is based require or justify such a construction of the same. What is this reason? It is simply that, if errors are claimed in the instructions, they may be drawn to the attention of the Court before it is too late for the trial Court to correct the same. In other words the rule is that the exceptions must be taken before the verdict is returned, as until that time the Court may recall the jury and correct his errors.

Accordingly, in the recent case of Coffin v. The United States, 156 U. S. 432, where the exceptions were not taken before the jury retired, although it was stated in general terms that such exceptions were desired, and where the same were in fact not taken for six

hours after the jury originally retired, it being the understanding of Court and counsel at the time of such retirement that the exceptions might be taken later, it was held that they were properly taken. This ruling was made by this Court after a full citation of the decisions not only of this Court but of the State and the English courts. And it expresses beyond doubt the correct rule, namely, that the exception must be taken at the trial and before the verdict is rendered, and while it is not too late for the trial Court to correct its error. The rule and the reason for it are nowhere better stated than in Jones v. Van Patten, 3 Ind. 111.

This is but a single illustration taken at random, showing the absolute necessity of supervision by this Court in these matters of practice, to prevent conflicting decisions and the denial of their rights to ligitants.

Coming back now directly to the question of practice involved in the case at bar, we contend:

First. Here, under any correct practice, no motion was made or presented during the term at all. The meaning of the word "motion" implies something more and different from the mere filing of a paper in the clerk's office. A filing of the application in the clerk's office without bringing it to the attention of the Court during the term counts for nothing.

Emison Trustee v. Shepard, 121 Ind. 184;
Railsback v. Walke, 81 Ind. 409;
Jacquay v. Hartzell, 1 Ind. App. 500;
Deering v. Armstrong (Ind. App.), 48 N. E. Rep. 1045.

The last cited case was tried by a special judge, the regular judge being disqualified. The special judge was absent when the verdict was returned and during all the balance of the trial term. The application for a new trial was filed with the clerk during the term. But it was held that these facts did not excuse the nonpresentation of the motion to the Court during the term, and the application was held not to have been properly made.

It is, we think, entirely clear that in no proper sense was the motion made in this case during the term. The purpose of a motion is to induce action by the Court, and the mere filing of a paper in the clerk's office does not at all serve such purpose. It must be kept always in mind that not only does it not appear by the bill of excep-

tions that the motion for a new trial was brought to the attention of the Court, or that the same was taken into consideration by the Court, but the contrary of these facts does appear. The Court knew absolutely nothing about any such motion being filed until after the term had expired and after more than six months had elapsed after the rendition of the judgment.

Second. As before stated, the decisions by this Court make the seasonable filing and presentation and the taking cognizance of the motion an essential fact.

The leading case on this subject in this court is Brockett v. Brockett, 2 How. 238, wherein Mr. Justice Story says:

"*During the same term*, a petition was filed by the defendants on the 26th day of the same month (May), to have the final decree opened for certain purposes; *and the court took cognizance of* the petition and referred it to a master commissioner. His report was made on the 9th of June following, the same term still continuing, and the court then refused to open the final decree; and from this refusal, as well as from the final decree, the defendants took an appeal, and gave bond with sufficient sureties, on the 15th day of the same month, and the appeal was then allowed by the court. Before that time the court had not fixed the penalty of the bond.

"Now, the argument is, that as the original final decree was rendered more than one month before the appeal, it could not operate under the laws of the United States as a supersedeas, or to stay execution on the decree; because to have such an effect the appeal should be made and the bond should be given within ten days after the final decree. But the short and conclusive answer to this objection is, that the final decree of the 10th of May was suspended by the subsequent action of the court, and it did not take effect until the 9th of June, and that the appeal was duly taken, and the appeal bond given within ten days from this last period."

That is, the petition for rehearing filed and taken into consideration by the Court and action had at the same term suspended the operation of the decree. Suppose that in that case the Court had not heard of the petition to open the decree during the term?

So, in Texas & Pacific Railway Company v. Murphy, 111 U. S. 488, which is rested upon the authority of Brockett's case, the same element which is wanting here was held to be controlling. Thus it is there said:

"In Brockett v. Brockett, 2 How. 238, it was decided that a petition for rehearing, presented in due season and *entertained by the court*, prevented the original judgment from taking effect as a final judgment, for the purposes of an appeal or writ of error, until the petition was disposed of. This record does not show in express terms when the motion for a rehearing was made, but it was entertained by the court and decided on

its merits. The presumption is, therefore, in the absence of anything to the contrary, that it was filed in time to give the court control of the judgment which had been entered, and jurisdiction to enforce any order that might be made. This presumption has not been overcome."

In the case at bar, on the contrary, it does appear that the motion for a new trial was not seasonably filed to give the Court control of the judgment, the same being filed five months and three days after judgment, and it does affirmatively appear that the matter was never brought to the attention of the Court until after the term had expired.

It is to be borne in mind that action on a motion for a new trial in the United States courts rests entirely in the discretion of those courts, and it can not be said that such a motion filed in the last month of a six months' term of court, and nearly six months after the judgment, is seasonably filed, to say nothing of the fact that it is not brought to the attention of the Court at all during the term.

In Aspen Mining Co. v. Billings, 150 U. S., on page 36, it is said:

"The decree dismissing complainant's bill was entered on October 20, 1890, but an application for a rehearing was made shortly thereafter and during the same term, but not disposed of until May 5, 1891.

"The rule is that if a motion or a petition for rehearing is made or presented in season and entertained by the court, the time limited for a writ of error or appeal does not begin to run until the motion or petition is disposed of. Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal."

Citing

Brockett's case,
Texas & Pacific case, and
Memphis v. Brown, 94 U. S. 715.

This matter of seasonably filing the motion and the entertainment of the same at the term by the Court is a feature in all of the cases. In addition to cases cited, see, also, Voorhees case, 151 U. S. 135.

Memphis v. Brown also rests upon the authority of Brockett v. Brockett, and goes no further than that decision.

Nor do the cases cited from the Circuit Court of Appeals and Circuit Courts go any further.

Thus in Louisville Trust Co. v. Stockton, 72 Fed. Rep. 1, Circuit Court of Appeals, Fifth Circuit, it is said by Judge Pardee:

"We have examined the record and considered the argument of counsel. The judgment in the court below was rendered on the *1st day of May, '95*, and *thereupon* a motion for a new trial was entered which was overruled on the *2d day of June '95*. The citation directing the defendant in error to answer in this court was signed and issued on the 9th day of November, 1895, more than six months after the entry of the judgment sought to be reviewed, but within six months from the date when the motion for a new trial was overruled. The time limited for suing out a writ of error does not begin to run while there is a motion for a new trial pending. Railway Co. v. Murphy, 111 U. S. 488."

In that case the word "thereupon" indicates that the motion for a new trial was entered on the very day (certainly very shortly after) the judgment was entered, and it was overruled at the same term a month later. It is there said that the time limited for suing out a writ of error does not begin to run while there is a motion for a new trial *pending*, but in the case at bar for five months and three days there was no motion for a new trial pending. Was the limitation of the statute suspended during all that time? To say so is to say that a party against whom a judgment has been rendered on the first or second day of the term, where the term, as here, runs for six months, may by his own act, and without calling the same to the attention of the Court at all, by filing a motion for a new trial on the last day of the six months, make the limitation of the statute, as to him, a year, instead of six months, as Congress has provided.

In Andrews v. Thum, 72 Fed. Rep. 290, in the Circuit Court of Appeals of the First Circuit, a final decree appears to have been entered on May 13 and a petition for a rehearing to have been overruled on the 23d of June following. The appeal was within six months from the latter date. The petition for rehearing appears to have been promptly filed, and overruled at the same term at which the original decree was entered.

So in Alexander v. United States, 57 Fed. Rep. 828, on page 831, Judge Gilbert, speaking for the Circuit Court of Appeals of the Ninth Circuit, says:

"The question arises whether the six months within which to sue out the writ, as limited by section 11 of the act creating the Circuit Court of Appeals, had expired on April 2, 1892. We are of the opinion that it had not, and that the judgment of the territorial court was suspended by virtue of the motion for a new trial, which had been filed *in due time*, and *which had been entertained* by the court, and that it was so suspended until the final disposition of that motion."

So in Rutherford v. Insurance Co., 1 Fed. Rep. 456, and in Brown v. Evans, 18 Fed. Rep. 56—in fact, in every case where it has been held that the motion for a new trial or the petition for a rehearing operates to suspend the limitation of the statute, it has appeared in the record that the motion or petition was not merely *seasonably* filed in the clerk's office, but that it was actually brought to the *attention* of, and was taken into *consideration* by, the Court at the same term.

Thus in the case of Altenburg v. Grant, 83 Fed. Rep. 980, decided by the Circuit Court of Appeals of the Sixth Circuit, it appears that the verdict was rendered November 12th. Judgment was entered at once upon the verdict. November 15th, following, plaintiff filed a motion for a new trial. This motion was denied December 17th following. On June 15th the writ of error was allowed. It thus appears that in that case the motion for a new trial was filed within three days after the verdict, was entertained by the Court, and was finally disposed of within thirty-five days from the date of the verdict. The writ of error was allowed within six months after the motion for a new trial was overruled. Surely that case is no authority for the contention that a motion for a new trial, filed almost six months after the judgment, and never brought to the attention of the Court until considerably more than six months, and at the next term of the court, is operative to suspend the running of the limitation during all that time.

Woods v. Lindvall, 48 Fed. Rep. 73, decided by the Circuit Court of Appeals of the Eighth Circuit, is no more helpful to plaintiff in error. In that case, on the day following the verdict and judgment, defendants asked and obtained a stay of execution for forty-two days, to enable them to file a petition for a new trial, and the petition was filed within the forty-two days. There was a case where the motion or petition for a new trial was duly filed within a reasonable time by the permission of the Court, and was entertained by the Court at the same term.

In his brief on the motion to dismiss this writ in the Circuit Court of Appeals, counsel for plaintiff in error cited a dozen or more decisions by this Court and the Circuit Courts of Appeals, but after a careful examination of all, we assert that none of them goes beyond the Brockett case; and that in every one it appears that the

motion was not only seasonably filed, but was brought to, and entertained by, the Court during the trial term.

So that unless this Court is prepared to hold that the expression so frequently used in the decisions, "seasonably filed and entertained by the Court," means absolutely nothing, it would seem clear that the writ of error in the case at bar was not sued out in due time.

It must be kept in mind that the motion for a new trial in the federal practice is addressed entirely to the discretion of the Court; that error cannot be predicated of any action thereon, and that being thus discretionary, it can not have any possible effect, except as brought to the attention of the Court and within the purview of that discretion. To argue that an appeal to discretion of one who knows nothing of such appeal, is operative for any purpose, is a contradiction in terms. As no ultimate rights depend on the motion, it would be no legal wrong were the Court to refuse to permit the motion to be filed, or strike it from the files, if placed there without leave. It is, and can therefore be, as the decisions above indicate, effective only when filed by leave or entertained by the Court. Until such action by the Court, it counts for nothing.

The writ of error is purely statutory and the Appellate Court gets jurisdiction only by a strict pursuance of the statute.

Stevens v. Clark, 62 Fed. Rep. 321.

So stringent is this rule that, after six months, parties can not give jurisdiction by consent.

Dodson v. Fletcher, 79 Fed. Rep. 129.

It is worthy of note that the terms of the U. S. Circuit Court for Indiana are six months' terms, while in our State courts terms occur monthly, or at most not more than two or three months apart. Is a party to be permitted to lie by for six months, saying and doing nothing, and, without the knowledge or consent of the Court, to stay the operation of an act of Congress during all that time? Such is the effect of the decision of the Circuit Court of Appeals in this case.

II.

It is equally clear that the motion for a new trial can not help to connect this bill of exceptions with the record, and the argument rests upon the same reasoning and line of decisions as that touching the writ of error.

The United States statute, Section 914, Revised Statutes, adopting the State practice in common law cases, has no application to a motion for a new trial or bills of exceptions.

Chateaugay Iron Co., 128 U. S. 544;
Prichard v. Budd, 76 Fed. Rep. 710;
Minneapolis v. Emerson, 80 Fed. Rep. 993;
Rhodes v. United States, 79 Fed. Rep. 740.

By the same decisions it is shown that he action of the trial Court on a motion for a new trial is purely discretionary and not reviewable on writ of error.

This being so, it is not seen how action on such motion can enable a court, at a term subsequent to that of the trial, verdict and judgment, to bring forward and embody in a bill exceptions taken at the trial term, no time for that purpose having been granted at such trial term.

The rule is that a bill of exceptions can only be signed at the term at which the exceptions are taken and judgment rendered, unless the right is reserved to the Court by a special order or a rule of court to sign it afterwards.

Muller v. Ehlers, 91 U. S. 249;
Richmond, etc., v. McGee, 50 Fed. Rep. 906;
N. Y. & N. E. R. R. v. Hyde, 56 Fed. Rep. 188.

In the Richmond case, on page 907, Chief Justice Fuller, speaking for the Circuit Court of Appeals, says:

"From the foregoing statement it will be seen that no bill of exceptions was presented to the trial judge for signature, and signed by him during the term at which the trial was had and judgment rendered, nor within any extension of time for that purpose granted by him and entered of record, or consented to by counsel. This being so, the certificate of February 20th is entirely unavailing, even if in itself sufficient if executed in due time. The case comes clearly within Muller v. Ehlers, 91 U. S. 249. See, also, Jones v. Grover & Baker S. M. Co., 131 U. S. Appendix, cl.;

United States v. Carey, 110 U. S. 51, 3 Sup. Ct. Rep. 424; Express Co. v. Malin, 132 U. S. 531, 10 Sup. Ct. Rep. 166; Glaspell v. Railroad Co., 144 U. S. 211, 12 Sup. Ct. Rep. 593. In Davis v. Patrick, 122 U. S. 138, 7 Sup. Ct. Rep. 1102, the delay was attributable to the judge after the party excepting had done all that he could to procure the settlement of and signature to the bill, while here no bill of exceptions was ever presented, nor was the paper relied on as such tendered to the judge until after the time within which he could act had expired."

In the case of 56 Fed. Rep., on page 191, Judge Putnam quotes from Justice Gray, speaking for the Supreme Court in Bank v. Eldred, 143 U. S. 293, as follows:

"By the uniform course of decision, no exceptions to rulings at a trial can be considered by this court, unless they were taken at the trial, and were also embodied in a formal bill of exceptions presented to the judge at the same term or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, save under very extraordinary circumstances, they must be allowed by the judge and filed with the clerk during the same term. *After the term has expired, without* the court's control over the case being reserved by standing rule or special order, and especially after a writ of error has been entered in this court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end."

Plaintiff in error, however, while constrained to admit that the rule of practice on this subject is against him, contends that when a motion for a new trial has been filed at the trial term, an exception to the rule prevails. He cites to this point two cases in the Eighth Circuit Court of Appeals.

Woods v. Lindvall, 48 Fed. Rep. 73, and
M., K. & T. R. R. v. Russell, 60 Fed. Rep. 501.

But these cases do not go far enough to save this bill of exceptions.

They involve three elements, neither one of which is present here.

First. The motion must have been filed at the trial term *by leave of Court.*

Second. The consideration thereof must have been by the Court postponed to the subsequent term.

Third. The practice in the trial court must have been to render judgment immediately on return of verdict, and to postpone settling bill of exceptions till after action on that motion.

Here, as we have seen, the Court never heard of the motion during the trial term; of course the Court did not postpone the hearing thereon, and not only is there no showing of such a practice to render judgment on verdicts immediately, and to postpone settling the bill of exceptions till the motion is disposed of at a subsequent term, but no such showing could be made, for there is no such practice in this circuit.

The result is that the case—M., K. & T. R. R. v. Russell, 60 Fed. Rep. 501—is one of the strongest authorities against the contention of plaintiff in error.

In order for a motion for a new trial to extend the time for filing a bill of exceptions, that motion must have been seasonably filed, brought to the attention of the Court, and entertained by the Court, and all that within the trial term. When thus seasonably filed and entertained, it is not doubted that it may be operative to suspend the running of time till it is decided. So far the cases cited by counsel for plaintiff in error go, and none of them go further. This is the rule in Brockett's case, touching the writ of error which rests on the same principle. Further than this the decisions do not go, and can not go, without making the will of the litigant, without any consideration or action by the Court, within broad limits, the measure of the limitation in each case.

Our contention that a motion for a new trial counts for nothing unless seasonably filed and entertained by the Court is supported by the cases cited for plaintiff in error below.

> Adrian Furniture, Etc., Co. v. Lenawee Circuit Judge, 52 N. W. Rep. 615.

The opinion in that case in full is as follows:

"A verdict was rendered and judgment entered against relator, May 29, 1891. Time was granted to the relator in which to move for a new trial, and subsequently the time was extended for that purpose. Within the time granted a motion for a new trial was made, which was afterwards heard, but said motion was not finally disposed of and determined until May 12, 1892. After the motion for a new trial was determined, relator moved the Court for time within which to settle a bill of exceptions, but the Court denied the motion, upon the ground that the term in which the judgment was entered having passed, and no extension of time having been obtained, the Court had no power or discretion in the matter. The rule is well established that a bill of exceptions must be settled, or the time to settle it must be extended, in the first instance during the term in

which the judgment was entered. Cleveland v. Stein, 14 Mich. 333. In that case, however, no motion for a new trial had been made, and the judgment became final for all purposes at the end of the term. But where a motion for a new trial is made it would be useless labor to prepare a bill of exceptions in advance of the determination of that motion. The writ of error is the dernier resort, and judgment can not be said to be final so as to deprive the trial Court of the power to act in the premises during the term in which the Court disposes of the pending motion. In case, therefore, no motion for a new trial is made, the term within which a bill of exceptions must be settled, or the time extended in the first instance, is that within which the judgment is entered; but where a motion for a new trial is made within the time allowed by rule, or within the time allowed by the Court, or by leave of the Court, the term within which such bill of exceptions must be settled or the time extended must be deemed to be that in which such motion is finally determined. Greeley v. Percival, 21 Fla. 538; Hearson v. Graudine, 87 Ill. 116; People v. Gary, 105 Ill. 264. The same question came before this Court in Brotherton Iron Min. Co. v. Gogebic, and was determined in January, 1889, in accordance with the foregoing, but no opinion was filed. The writ must issue as prayed, commanding the Court to fix a time, within its discretion, within which a bill of exceptions may be settled, and the time for issuing a writ of error in said matter will be extended until November 29, 1892."

It will be noticed that the other State cases from Florida and Illinois cited for plaintiff in error below are the cases cited in this opinion of the Michigan court. We are quite content to leave for decision, without comment, the question whether that opinion furnishes any sanction for the contention that a motion for a new trial, filed without leave or notice to the Court and between five and six months after the judgment and never brought to the attention of the Court until the next term, is operative to extend the time for filing a bill of exceptions.

So in the Missouri cases cited, Riddlesbarger v. McDaniels, 38 Mo. 139, and Givens v. Van Studdiford, 86 Mo. 149, and in the Illinois cases, Hearson v. Graudine, 87 Ill. 116, and People v. Gary, 105 Ill. 264, it is distinctly shown that in each case the motion for a new trial was made in due time and called to the attention of and entertained by the Court at the trial term. The Florida case, Greeley v. Percival, 21 Fla. 538, cited for plaintiff in error, we have not at hand.

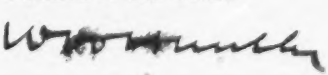
With reference to Talbott v. Press Company, 80 Fed. Rep. 567, in which Judge Lacombe at Circuit held that it was competent for the trial court, after the lapse of the term and long after the expiration of the time originally granted in which to file a bill of exceptions,

to make a *nunc pro tunc* entry making another grant of time for filing of such bill, we have only to say, that, if such a power resides in the Circuit Court, it is not seen that the decisions by this Court and the rules it establishes as to such questions are of much value; for if that decision is correct, the Circuit Judge has a "dispensing power" (so far as such rules and decisions are concerned) as broad as any that was ever claimed by a Stuart King. If such a discretion resides in the judges it would seem that this Court was mistaken when it announced that this is "a government of laws and not of men."

In conclusion, we submit that there is in this record no fact or circumstance to take the case out of the general rule that a bill of exceptions can not be signed or filed after the expiration of the trial term, except when an order is made extending the time.

And we submit, moreover, that this rule has been established as the result of long practice, because found to be necessary and convenient for avoiding controversies in settling such bills; and, as the Courts well say, it ought not to be disregarded, except where special leave is granted extending the time, or where authorized by a rule of court or a special practice so well settled as to amount to a rule of court. It is a mistake to suppose that, by the use of stenographers, the need of promptness in settling bills of exceptions is past. On the contrary, this very case is an illustration of the fact that such bills are made up independently in large measure of the stenographer's notes, from memory, as to what the facts were and what the evidence tends to prove. Moreover, we suppose it will hardly be insisted that the rule as to the time of taking a bill of exceptions is to be one thing in a case where there happens to be a stenographer and another where there is none.

We, therefore, ask that this Court will order this case entire to be certified to this Court.



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No. 292.

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Supreme Court of the United States.

No. 292.

OCTOBER TERM, 1898.

HOSEA B. TULLIS,

v.

LAKE ERIE & WESTERN RAILROAD COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

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Supreme Court of the United States.

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OCTOBER TERM, 1898.

HOSEA B. TULLIS,

v.

LAKE ERIE & WESTERN RAILROAD COMPANY.

BRIEF FOR DEFENDANT IN ERROR.

The Certificate of the Judges of the Circuit Court of Appeals of the Seventh Circuit is as follows:

"CERTIFICATE TO THE SUPREME COURT.

Before Woods, Jenkins and Showalter, Circuit Judges.

In this case, duly argued and submitted to this Court, there arises a question of law concerning which this Court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow-servant, for which the defendant in error is alleged to be responsible by force of an

Act of the Legislature of Indiana, approved by the Governor of the State, March 4, 1893. The first section of the Act reads as follows:

"1. That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employe while in its service, the employe so injured being in the exercise of due care and diligence, in the following cases:

"*First*. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"*Second*. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employe at the time of the injury was bound to conform, and did conform.

"*Third*. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"*Fourth*. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, round-house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, co-employe or fellow-servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, co-employe or fellow-servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws."

For the entire act reference is made to the Session Laws of 1893, page 294, Burns' Annotated Indiana Statutes, revision of 1894, paragraphs 7083 to 7087, inclusive.

The Lake Erie & Western Railroad Company is a corporation of the State of Illinois, owning and operating a railroad extending from Peoria, Illinois, into and through the State of Indiana.

It is contended that the statute referred to is invalid because inconsistent with the fourteenth amendment of the Constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this Court is that material error was committed at the trial for which the judgment below should be reversed if the statute mentioned is valid, and that if the statute mentioned is invalid the judgment should be affirmed. The question whether that statute is valid or violates the fourteenth amendment of the Constitution of the United States the Court hereby orders certified and submitted to the Supreme Court of the United States for its decision.

WM. A. WOODS,
JAS. G. JENKINS,
JOHN W. SHOWALTER."

We contend that the statute of the State of Indiana therein set forth is obnoxious to the fourteenth amendment to the Constitution of the United States, and invalid upon two principal grounds.

First. The statute is invalid in that it denies to corporations the equal protection of the laws, it being well settled that corporations are persons within the meaning of the fourteenth amendment.

Gulf, etc., Co. v. *Ellis*, 165 U. S. 154.

It makes corporations liable simply because they are corporations. It makes them liable in cases where under precisely the same circumstances and conditions, individuals and partnerships would not be liable. It is a classification of employers—not of employments, of those who do—not of what is done.

Second. If it be contended, as the Supreme Court of Indiana has held, that the statute may be valid as to railroad corporations, though it may be invalid as to other corporations, then we say it is invalid as to railroad corporations, because it discriminates against railroad corporations in that it makes such corporations liable for damages in cases where, under precisely the same

circumstances and conditions, employers who are individuals or partnerships, or other corporations, would not be liable.

In each case it is submitted that the statute is fatally infirm in that it makes liability or non-liability depend upon an arbitrary and not a reasonable classification.

I.

As to the first question. The statute by its terms applies to all corporations, but does not apply to individuals or partnerships conducting the same business.

It is not only well settled that a corporation is a person within the meaning of the fourteenth amendment, but it is equally well settled that any legislation based on classification must rest on a reasonable classification, a classification having a just and proper relation to the subject-matter.

Gulf, etc., Co. v. *Ellis, supra,* page 155.

This rule and the reasons for it are most cogently stated and enforced by Chief Justice Beasley in the *State ex rel* v. *Hammer,* 42 N. J. L 435, where it is said:

"But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation."

The decisions of Courts, state and federal, are uniform in support of this proposition that classification, in order to be valid classification, must have reference to the subject-matter and not be merely arbitrary.

Commonwealth v. *Patton,* 88 Pa. St. 288;
Edmonds v. *Herbrandson,* 50 N. W. Rep. 970;
State ex rel v. *Mitchell,* 31 O. St. 592;
People v. *The Board,* 43 N. Y. 10.

This proposition has been repeatedly enforced in the consideration of statutes of this character.

Smith v. *Louisville & Nashville Railroad Co.*, 75 Ala. 449, was an action brought under a statute, which the Court held to be unconstitutional, upon the ground that it discriminated between corporations and private associations and other persons, and therefore denied to the former the equal protection of the law. This is the statute:

"When the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or private association of persons, the father of such child, or if the father be not living, the mother, may maintain an action against such corporation or private association of persons, for such wrongful act or omission, and may recover such damages as the jury may assess."

Stone, J., said:

"Is the act copied above constitutional? It will be observed that under the statute, the action lies only against certain classes; corporations and private associations of persons. These are held accountable for the wrongful acts and omissions of their officers and agents. Individuals engaged in the same business, having the same description of officers and agents, may cause the death of a minor child by the wrongful act or ommission of such officer or agent, and there will be no liability for such death. To illustrate: Manufacturing establishments in all their extensive variety, mining enterprises, cotton compresses, mills, steam vessels, and even railroads, may be owned and operated without incorporation, and by a single proprietor. These are not within the law, and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither the father nor the mother can maintain a suit. If, however, there be more owners than one, or, if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother, if he be dead. This precise difference the statute makes, although the character of the business, and the wrongful act or omission of the agent be, in each case, the same. How this will work will readily suggest itself. If the employer, being a single individual, be not responsible for the wrongful act or omission of the agent he employs, how can the same act, by the same agent, employed under the same circumstances, impose a penalty on the innocent employer, merely because two or more own the business, and united in employing the agent? If so, on what principle? Is individual enterprise less amenable to legislative surveillance than associated capital?"

The Court closes its opinion with the following observation:

"We regret the duty, so often cast upon us, of construing statutes which discriminate between persons, natural and artificial, sometimes in favor of the one, and sometimes in favor of the other; but we have no discretion." (P. 452.)

In *Soon Hing* v. *Crowley*, 113 U. S. 703, it was held that:

"Municipal restrictions imposed upon one class of persons engaged in a particular business, which are not imposed upon others engaged in the same business and under like conditions, impair the equal right which all can claim in the enforcement of the laws."

Mr. Justice Field, delivering the opinion, said:

"The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions." (113 U. S. 709.)

In *Gulf, Colorado & Santa Fe Railway Co.* v. *Ellis*, 165 U S. 150, a statute of Texas which singled out railway corporations, and made them alone liable for attorney's fees for failing to pay claims of a certain class, was held to contravene the fourteenth amendment, on the ground that it denied to railway companies the equal protection of the law. We ask the attention of the Court to the cases in State Courts referred to in the opinion of Mr. Justice Brewer (pp. 163-165), "in which legislation imposing special burdens on an individual or a class has been declared beyond the power of the legislature as against equality of right." He said, quoting with approval the language of Black, J., in *State* v. *Loomis*, 115 Mo. 307, 314:

"Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate laws and regulations." (165 U. S. 155, 156.)

Again:

"Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the fourteenth amendment forbids

this. No language is more worthy of frequent and thoughtful consideration than these words of Mr. Justice Matthews, speaking for this court, in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' The first official action of this nation declared the foundation of government in these words: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.' While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government." (pp. 159, 160.)

Again:

"It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

(Page 165.)

In *State ex rel* v. *Sheriff of Ramsey County*, 48 Minn. 236, 51 N. W. 112, the Court held unconstitutional an Act prohibiting the emission of dense smoke within the limits of a city, upon the ground that it excepted "manufacturing establishments using the entire product of combustion, and the heat, power and light produced thereby, where they are generated or within a radius of three hundred feet therefrom." The Court said:

"No arbitrary distinction between different kinds or classes of business can be sustained, the conditions being otherwise similar. The statute is leveled against the nuisance occasioned by dense smoke, and it can make no practical difference in what business the owners or occupants of the buildings in which such smoke is produced are engaged,

or whether the heat evolved from the combustion of the fuel producing such smoke is applied to the generation of steam or other useful purposes; or, further, whether steam power is used in manufacturing, or is applied to other uses, as a grain elevator or hoisting apparatus in a warehouse. We are obliged to hold that the distinction or classification attempted to be made is untenable."

(Pp. 240, 241.)

The objection to the statute at bar is that suggested by Gilfillan, C. J., in *Lavallee* v. *St. Paul, M. & M. Ry. Co.*, 40 Minn. 249; 41 N. W. 974, that it makes a classification based "not on the character of the employment, nor of the dangers to which the employes are exposed, but on the character only of the employers. We can see why the employers' liability should be greater when the business is that of operating a railroad, but can not see why one individual or corporation should be held to a rule of liability different from that applied to another, when the employment and its hazards are precisely the same."

Viewed from the standpoint of the servant, the statute gives to those who are in the employ of corporations rights which it denies to those who are in the employ of individuals, co-partnerships, or joint stock companies, although they may be carrying on the same business under similar circumstances.

In *Deppe* v. *Railroad Co.*, 36 Iowa, 52, 55, the Court puts this illustration:

"Suppose a railroad company employ several persons to cut the timber on its right of way where it is about to extend its road, and the land owner employs a like number of persons to cut the timber on a strip of equal length alongside of such right of way. If one of each set of employes shall be injured by the negligence of a co-employe, and the railroad employe can, under the statute, maintain an action against his employer and the other can not, then it is clear that the law does not apply upon the same terms to all in the same situation."

In *Johnson* v. *St. Paul & D. Ry. Co.*, 43 Minn. 222, 45 N. W 156, the Court said:

"If a distinction is to be made as to the liability of employers to their employes, it must be based upon a difference in the nature of the employment, and not of the employers. One rule of liability can not

be established for railway companies, merely as such, and another rule for other employes, under like circumstances and conditions, unless upon the theory suggested in *Railway Co.* v. *Mackey*, 127 U. S. 205, that the state may 'prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters,'—a proposition which, as thus broadly stated, that Court, in view of its later utterances, could hardly have intended to announce. Indeed, the particular question now under consideration was not before the Court, and, presumably, was not in mind. Neither would it relieve the act from the imputation of class legislation that it applies alike to all railroads. It has been sometimes loosely stated that special legislation is not class, 'if all persons brought under its influence are treated alike under the same conditions.' But this is only half the truth. Not only must it treat alike, under the same conditions, all who are brought 'within its influence,' but in its classification it must bring within its influence all who are under the same conditions. Therefore, if a distinction is to be made between railway corporations and other employers, as respects their liability to their employes, it must be based upon some difference in the nature of the employment, and can only extend to cases where such difference exists.''

The statutes involved in the three preceding cases were held to be constitutional because limited to the hazardous employments of railroads; we quote the opinions to show the tests that were applied to accomplish that result. The application of the same tests to the Indiana statute demonstrates its invalidity.

There are numerous statutes of Indiana providing for the organization of corporations. By reference to a single one, popularly known as "The Manufacturers' and Miners' Act," it will be seen that corporations may do almost anything in the way of business that natural persons may.

R. S. 1894, Burns, Section 5051.

There, in a single section, the formation of corporations for the purposes of carrying on any kind of manufacturing, mining, mechanical or chemical business, or to furnish motive power therefor, or for organizing water companies, stock yards and transit companies, elevator companies, buying and selling dry goods, carpets, boots, shoes, millinery goods, fancy goods or jewelry, is authorized. As before stated, under other statutes a very large number of corporations are provided for, such as banks, railroad companies, street railroad companies, gas companies, pipe

line companies, voluntary associations or corporations; in short, as before stated, under the legislation of Indiana there is scarcely any business that can be transacted by an individual or partnership that is not authorized to be transacted by corporations. Under these circumstances, and in view of the fact that such corporations are persons within the purview of the fourteenth amendment, it is almost impossible to believe that such a statute as the one under consideration can be held valid.

By way of illustration, we may say that we have in the City of Indianapolis two very large establishments dealing in dry goods and general merchandise, one of them a corporation, the other a partnership. Each of them occupies a building with many floors reached by passenger elevators. Can any one give a good reason why the corporation shall be held liable to an employe operating one of these elevators because it is a corporation, while the partnership, for a like accident under precisely like circumstances, would not be liable?

So we have factories and machine shops operated by corporations, and others of the same character doing the same kind of work under precisely the same conditions, owned and operated by individuals and partnerships. Until some sound reason can be given why in one case there should be a liability without reference to the question whether the cause of the accident was the accident of a co-employe, while in the other case there should be no such liability, it is not seen how this law in its entirety can be held valid. It has not so far been held valid by the Supreme Court of Indiana, although it has had the question under consideration for a very considerable time.

In the case of the *P. C. C. & St. L. R'y Co.* v. *Montgomery*, cited by plaintiff in error, that Court sedulously avoids making such a decision. It says (49 N. E. 587):

"Objection is made to the validity of the act because it embraces al corporations except municipal, and that there are other corporations whose business may be such as not to afford any reasonable ground for their classification, in that their business may not be peculiarly dangerous to life and limb like that of railroads. To this it may be answered, if the act is valid as to railroad companies, the appellant, a railroad corporation, can not be permitted to litigate the constitutionality of the

act as to other corporations. *Henderson* v. *The State*, 137 Ind. 552; *Board* v. *Reeve*, 148 Ind. 467; *Curryer* v. *Elliott*, 141 Ind. 294. It will be time enough to decide its validity as to other corporations when any of them come before this court with a case presenting the question."

This brings us face to face with the question whether a law general in its terms, applying to all corporations, will be by this Court held to be valid as to such corporations as might have been embraced in a law made specially applicable to such corporations, though invalid as to others. In other words, the question is whether such a law will be held to be enforceable by selection and construction against certain corporations, and non-enforceable as to others. It would seem upon principle that this can not be done. The effect of such a ruling is to make the law uncertain and doubtful in its application. No court, no person, can go through the list of the different kinds of business corporations operating in Indiana, and say with confidence these are amenable to the provisions of this statute and those are not.

Shall it apply to a street railroad corporation? It has in many cases been held that legislation with reference to ordinary railroads has no application to street railroad companies. The legislature of Indiana has recognized the difference between the two classes of corporations and has provided different statutes for their organization, regulation and operation.

Shall it apply to corporations engaged in the business of running steamboats, carriers by water? The dangers of such a business are not less imminent than those pertaining to railroad transportation. Shall it apply to mines, to factories and machine shops, to elevator companies, to corporations engaged in the construction of high buildings? Shall it apply to all kinds of business done by a given corporation, as for instance a corporation engaged in the dry goods trade or such parts only of its business as are hazardous? Shall it apply with reference to a railroad corporation as well to the clerks in its offices as to the brakemen and switchmen on its road?

All these are questions of practical and urgent importance which the law, as it is framed, leaves open, and which no lawyer, much more no layman, can intelligently decide.

Fortunately, however, this question, as it seems to us, has not been left an open one in this Court.

An attempt was made to have this Court apply the principle upon which the Supreme Court of Indiana rests its decision in the Montgomery case, nearly twenty-five years ago, in the case of the *United States* v. *Reese*, 92 U. S. 214, but without success. Congress was, by the fifteenth amendment, authorized to enact appropriate legislation for the enforcement of that amendment, that is to prevent discrimination against electors on account of "race, color or previous condition of servitude." An act was passed for that purpose, but its third and fourth sections were general in their terms, and were not confined in their operation to unlawful discrimination on account of "race, color or previous condition of servitude." In the particular case in hand the indictments alleged that the discrimination was in fact on account of race, being against negro electors. It was contended on behalf of the Government that upon these facts the law was enforceable in that case, because as applicable thereto the statute was within the lines of authority in the amendment. This Court, however, held otherwise and declared the law invalid, because, it was said, the Court could not attempt to enforce a law, invalid in part, by construction. The doctrine of the Montgomery case, *supra*, would have sustained that prosecution, would have said that the law was valid as against the parties indicted in that particular case, and that "it will be time enough to decide its validity as to others when any of them come before this Court with a case presenting the question." And if the principle of the Montgomery case is a correct principle, it would seem that the decision in the Reese case was indefensible.

In the case of *Baldwin* v. *Franks*, 120 U. S. 678, the doctrine of the Reese case was re-affirmed. In that case Baldwin was held in custody of the marshal on a charge of conspiracy to deprive Chinese aliens of certain rights. The statute made it an offense for two or more persons to conspire in any State for the purpose of depriving *any person or class of persons* of the equal protection of the laws, etc. It was contended that this statute was invalid because it was general and applied to any persons or class of persons, whereas it was not competent for Congress to enact such legislation for the protection of the rights of ordinary

citizens within a State, although such act, if specially directed to that subject-matter, would have been valid for the protection of the rights of aliens guaranteed by treaties. It was in that case again contended, that, as it was in fact a case of aliens deprived of rights guaranteed by treaties, the law was valid and enforcable as against the man who deprived such aliens of those rights; and that, as said in the Montgomery case, it would be time enough to hold the law invalid as to other parties when such other parties presented the question. But again this Court said that the law was general, and it could not and would not attempt to enforce it by construction as to some, when it would be compelled to deny its validity as to others plainly within the scope of its language.

So in the Trade Mark Cases, 100 U. S. 82, where the legislation was general for the purpose of protecting trade marks and punishing the counterfeiting of trade marks and the sale or dealing in counterfeit trade mark goods, it was held that, while such legislation might be valid as to such parts of the commerce of the country as was within congressional control, yet, not being limited to that, but being general in its terms, the statute could not be held to be a valid enactment.

While of course these decisions of this Court do not need the support of the decisions of any state court, yet it is not unworthy of note that the Supreme Court of Indiana has not only referred with approval to these decisions, but has itself announced the same principle.

Thus in *State ex rel Corwin v. Indiana, etc., Oil Company*, 120 Ind. 575, on page 579, that Court has said:

"To authorize the Courts to reject a part and sustain a part of a statute, the parts must be capable of separation so that each may be read by itself. Limitation by construction is not separation. *Baldwin* v. *Franks*, 120 U. S. 678; Virginia Coupon Cases, 114 U. S. 269; Trade Mark Cases, 100 U. S. 82; *United States* v. *Reese*, 92 U. S. 214."

The same doctrine is stated by the same Court in *Logan* v. *Stogsdale*, 123 Ind. 372, and in the *State* v. *State ex rel*, 119 Ind. 520.

II.

In determining whether a statute void in part shall be upheld in part, the Courts are compelled to consider, not merely whether a part of the statute may be separated from the rest and separately enforced, but also whether the law as thus separated with a part eliminated can be said to express the legislative will upon the subject. Can the Court say that the legislature would have enacted the part assumed to be valid except in connection with the other parts of the statute? What right has any Court to say that the Legislature of Indiana would have enacted this statute, as a statute applicable to steam railroads only, and exempt from its operation carriers by water, carriers by street railroads, miners, manufacturers of fire works or of gun powder, corporations using the most dangerous explosives in drilling gas wells or quarrying stone, in short any and all other corporations except, steam railroad companies, engaged in business involving extra hazard to life and limb?

In *Meshmeier* v. *The State*, 11 Ind 482, Judge Worden, speaking for the Supreme Court of Indiana, says:

> "The legislature pass an entire statute, on the supposition, of course, that it is all valid and to take effect. The Courts find some of its essential elements in conflict with the Constitution, strip it of those elements, and leave the remaining portion mutilated and transformed into a different thing from what it was when it left the hands of the legislature. The statute thus emasculated is not the creature of the legislature; and it would be an act of legislation on the part of the Courts, to put it in force. The Courts have no right thus to usurp the province of the legislature."

If the language of this statute were, "that every corporation except municipal operating in this State" etc., the literary meaning and legal effect would be precisely the same as now. Would it be contended that, if invalid as a whole, it would be the duty of the Courts by selection to apply and enforce it as to some corporations and deny its enforcement as to others? But as before stated the meaning and legal effect of the statute as it stands is precisely the same as if it read "every corporation" only.

If any inference can be drawn from the fact that the statute names a railroad corporation, it would seem to be that the bill was drafted to apply to railroad corporations only; but had to be amended so as to apply to every corporation in order to be passed. Certainly it would be wholly unwarrantable to suppose that the legislature would have passed the act as applicable to railroad corporations and no others.

The fact that the Court may be of the opinion that such a statute is a proper one, as applied to a railroad corporation, is altogether immaterial.

The question is not what law would be desirable or proper, but what the law is; not what the Court thinks, but what the legislature thought, and whether such thought by appropriate action was crystalized into a valid statute.

III.

But the suggestion that the Court strike out the provisions of the Act relating to "other corporations," and sustain it as an act applying to railroad corporations alone does not meet the needs of the case, for two reasons: In the first place the constitutional objection to the Act is not thereby removed, because it would still discriminate between railroads owned by individuals or co-partnerships or joint stock companies, (which are not corporations, *Chapman* v. *Barney*, 129 U. S. 677; *Gregg* v. *Sandford*, 28 U. S. App. 313, 65 Fed. 151), and those owned by corporations. If the railway business is to be regulated, the regulation must apply to all persons engaged in the business. It can not discriminate between corporations and other persons operating railroads under the same circumstances. Nor is it material whether this statute would apply to receivers of corporations as held in *Peirce* v. *Van Duzen*, 47 U. S. App. 339, 78 Fed. 693; contra *Burke* v. *Dillingham*, 23 U. S. App. 153, 60 Fed. 729. Under no construction can it apply to individuals or co-partnerships, *Beeson* v. *Busenbark*, 44 Kas. 669. The danger of operating railroad trains is the same whether operated by corporations or co-partnerships or individuals. While railroads are usually operated by corporations, there is nothing in the law of Indiana to prevent individuals or co-partnerships from purchasing and operating rail-

roads. It is in fact quite common for railroads to be purchased at master's sales and temporarily operated by individuals. Indeed railroad mortgages usually provide for taking possession and operating the road by a trustee in case of default in payment of interest; and, as a matter of fact, the railroad running from Indianapolis to Michigan City, was so possessed and run by General Wager Swayne, as such trustee, for several years between 1884 and 1889, and the Indiana, Decatur & Western Railroad, extending from Indianapolis to Decatur, Ills., has in like manner been operated by the trustee for years.

The other objection to the proposed judicial amendment of the statute is equally serious. It is aptly expressed in the words used by Chief Justice Waite, in *United States* v. *Reese*, 92 U. S. 214, 221, and in *Baldwin* v. *Franks*, 120 U. S. 678, 686:

> "To limit the statute in the manner now asked for would be to make a new law, not to enforce an old one."

To enforce the statute as one passed in the exercise of the police power for the regulation of railroads, (which is what the plaintiff asks the Court to do), is not "to give effect to what appears to have been the intent of the legislature," and that, as suggested by Chief Justice Waite, in *Allen* v. *Louisiana*, 103 U. S. 80, 84, is always the test.

The legislature has not undertaken to regulate or classify *occupations*, but to classify *employers*, putting in one class corporations, other than municipal, no matter what their business, and in another class all other persons, no matter in what business engaged, even if it be that of operating a railroad. The Court is not at liberty to reject the classification thus declared by the legislature, and to enforce the statute on an entirely different basis. The question before the Court is whether the classification proposed by the legislature is valid; not whether their act could be sustained if they had declared some other classification on a wholly different basis.

In *Warren* v. *Mayor and Aldermen of Charlestown*, 2 Gray, 84, Shaw, C. J., said:

"The same act of legislation may be unconstitutional in some of its provisions, and yet constitutional in others. * * * * But this must be taken with this limitation, that the parts so held respectively constitutional and unconstitutional, must be wholly independent of each other. But if they are so mutually connected with and dependent on each other as conditions, considerations or compensations for each other, as to warrant a belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions that are thus dependent, conditional or connected, must fall with them."

The foregoing passage is quoted with approval in *Allen* v. *Louisiana*, 103 U. S. 80, 84, Chief Justice Waite, adding:

"The point to be determined in all such cases is whether the unconstitutional provisions are so connected with the general scope of the law as to make it impossible, if they are stricken out, to give effect to what appears to have been the intent of the legislature."

In *Pollock* v. *Farmers' Loan and Trust Company*, 158 U. S 601, 635, 636, the income tax law of 1894 was upset because it constituted "one scheme of taxation," some of whose provisions were illegal. The Chief Justice quotes the test proposed by Mr. Justice Matthews, in *Poindexter* v. *Greenhow*, 114 U. S. 270, 304, viz:

"To hold otherwise would be to substitute for the law intended by the legislature, one they may never have been willing by itself to enact."

But these decisions do not really touch the case at bar. We have not before us two parts of a statute, one lawfully regulating one occupation and another attempting unlawfully to regulate another occupation; but a single statute undertaking to classify employers without reference to their occupations, and the simple question is whether the classification attempted can be sustained, or whether it discriminates unlawfully.

IV.

So far we have discussed these questions upon the theory that the statute is invalid because it discriminates against corporations as such, makes such corporations liable for acts which would not render individuals or partnerships liable under precisely the same circumstances.

We now come to the second proposition, namely, that if this act is to be taken, as the Supreme Court of Indiana has indicated, as applying separately to a railroad corporation, and is sought to be upheld as legislation against a railroad corporation specifically, without reference to other corporations, then it is invalid, because it is an unlawful discrimination against railroad corporations, as between them and other corporations and individuals, in that it makes the railroad corporation liable for damages in cases where, under precisely the same circumstances and conditions, other corporations or individuals, would not be liable. In other words the classification is an arbitrary classification of railroad corporations by name, and not a classification based upon and limited to the hazardous parts of railroad business.

Without challenging the proposition laid down in Mackey's case, 127 U. S. 205, that it is competent to legislate specially to meet special hazards and hardships, we do insist that in order to sustain the statute under consideration in that case, it is necessary to hold, as it seems to have been held in Pontius case, 157 U. S. 209, on the same statute, that it applies only to employes connected with the *operation* or peculiar hazards of the road. If the statute will bear and is to be given that construction, as was held in the Pontius case, then it may be upheld; but if it is to be construed as making the railroad company liable for an injury resulting from the negligence of one co-employe to another, without reference to the character of the occupation in which such employes were engaged, as for instance, if they were clerks in a railroad office, then it is submitted that the statute of Kansas would be invalid. An examination of the Mackey case and of the cases in which it has been cited, will disclose a marked difference in the language used in the statutes under consideration in the different cases. The statute of Kansas under consideration in the Mackey case and in the Pontius case, reads as follows:

"Every railroad company organized or doing business in this State shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes to any person sustaining such damage."

That is, the statute apparently applies to all employes of railroad companies, whatever their branch of service. Literally construed, that statute would rule a case brought, as before suggested, by a clerk in one of its offices for an injury resulting from the negligence of another clerk, to the case of one employe in one of its carpenter or foundry or machine shops or in an elevator, injured by the neglect of another employe in such office, shop or running such elevator, notwithstanding such work or negligence had no connection with the dangers of operating the road, and notwithstanding employes of individuals or of other corporations would have no remedy under precisely the same circumstances.

We agree, as held in the Mackey case, that it is competent to legislate so as to protect the employes of a railroad company against the peculiar dangers incident to parts of that service.

But such legislation must be limited to such dangers.

This may be done by classification, but the classification must have reference to the hazardous occupation, and it must be reasonable.

Gulf, etc., v. *Ellis*, 165 U. S. 154;
State ex rel v. *Hammer*, 42 N. J. L. 435.

A classification simply by name of railroad corporations does not meet this requirement.

This principle is recognized in all the other statutes, except that of Kansas, which have been reviewed by this Court.

Thus the Iowa statute involved in McLaughlin's case, 119 U. S. 566, and in Herrick's case, 127 U. S. 210, is expressly limited to cases connected with the *use and operation of the railway*. That statute reads as follows:

"Every corporation operating a railway shall be liable for all damages sustained by any person, including employes of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employes of the corporation, and in consequence of the willful wrongs, whether of commission or omission of such agents, engineers, or other employes, when such wrongs are in

any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

So the Utah statute in *Holden* v. *Hardy*, 169 U. S. 366, was not made applicable to all employes of mining companies, but to the "employment of working-men in underground mines," and to the "employment of working-men in smelters," etc., and limited the work to eight hours a day. That is, the classification was according to particular employments according to their hazards and hardships.

Suppose the classification had been simply as to "mining companies," so as to include clerks in their offices, or their ordinary employes, such as teamsters and others engaged in ordinary non-hazardous and not especially arduous work, and had then prescribed a special rule of an eight-hour day for such persons, while all others engaged in like pursuits had to work ten hours. Would the law have been held valid in such case?

We submit the entire discussion in the opinion of Mr. Justice Brown, commencing on page 393, shows that the law was upheld because the classification was according to hazard and hardship, and did not include all employes of the mining company. He says (p. 395):

"Upon the principles above stated, we think the act in question may be sustained as a valid exercise of the police power of the State. The enactment does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction or refining of ores or metals. These employments, when too long pursued, the legislature has judged to be detrimental to the health of the employes, and, so long as there are reasonable grounds for believing that this is so, its decision upon this subject can not be reviewed by the Federal Courts."

And the Supreme Court of Utah takes the same distinction, as shown in the same opinion.

So in *Peirce* v. *Van Dusen*, 78 Fed. Rep. 693, the Ohio statute seems to be regarded by Mr. Justice Harlan, speaking for the Circuit Court of Appeals, as applying only to a particular class of employes, those subject to peculiar hazards.

It does not seem to us that the cases such as the *Railway Co.* v. *Humes*, 115 U. S. 512, and *Railway Co.* v. *Beckwith*, 129 U. S. 26, which impose penalties or liabilities upon railroad companies that fail to fence their tracks, or the *Railway Company* v. *Mathews*, 165 U. S. 1, which makes a railroad company liable for fires set by its locomotives, have any direct bearing upon this question. Such statutes are enactments *in their nature* applicable to railroads and to no other parties. The classification is a classification based upon the nature of the business, and discriminates neither against railroad companies or against any other parties, whether corporations or individuals. They are police regulations pure and simple.

It is proper further to say that in the Mackey, the Herrick, and other cases in which similar rulings have been held, the precise question which we are presenting here has not been, so far as the opinions indicate, considered by the Court. In some of these cases the statutes apply to railroad corporations alone, but it was not claimed or suggested that they contravened the fourteenth amendment, because they did not apply equally to railroads owned or operated by persons or co-partnerships. No such question was presented or decided. Nor did either of those statutes undertake to classify employers generally, distinguishing corporations from individuals and co-partnerships. As construed by this Court they classified occupations, distinguishing the operation of railroads from all other occupations, and limiting the statute even as to railroads, to injuries connected with "operation;" (Pontius case), whereas the statute of Indiana classifies, not occupations, but employers, making all employers in any occupation liable, if they happen to be corporations other than municipal, while relieving them from liability, although engaged in the same occupation and under the same circumstances, if they happen to be individuals or co partnerships. Probably one-half of the employes of a railroad company have nothing directly to dowith its operation: have no duties of a public or *quasi* public character; are not subject to special hazards, such as ticket sellers, solicitors of freight and passengers, clerks, etc., etc., yet under the Indiana statute all are included; and all employes of individuals or partnerships, how ever hazardous the work, are excluded.

As shown under Subdivision I. of this brief, where State Courts have upheld this kind of legislation it has been because it was limited to hazardous employments, not to classes of employers.

V.

But the exception of municipal corporations would also make the law invalid. Under our city charters, cities may own and run a street car system, water works, gas works, etc. In so doing a municipal corporation stands before the law just like any business corporation. In such case, and as to such property, it is submitted that it is not competent under the fourteenth amendment to discriminate in their favor as in this act. The Supreme Court of the United States has held that, as to its property interests, the United States stands like any other litigant in Court. So does any municipal corporation.

Maximillian v. *New York*, 62 N. Y. 160;
Smith v. *Rochester*, 76 N. Y. 506;
Oliver v. *Worcester*, 102 Mass. 489.

In conclusion, we beg to say that the recent decision of the Supreme Court of Indiana in the Montgomery case, 49 N. E. Rep. page 583, is upon the law here in question and is entitled to just so much consideration as its reasoning merits and no more.

As to the question whether a State statute is at war with the Federal Constitution, this Court judges for itself.

Wright v. *Nagle*, 101 U. S. 794;
Jefferson, etc. v. *Skelly*, 1 Black 436;
Mobile, etc. v. *Tennessee*, 153 U. S. 486.

That the decision in the Montgomery case is not entitled to consideration on the ground that it was a carefully considered case is patent on its face. Its logic is no better than that of the wolf in the fable. It cites as authority the case of *Bucklew* v. *Railway Co.*, 64 Iowa 611, and says:

"That decision rests largely on two decisions made upon the subject of the employer's liability act of Kansas, and that of Iowa in the Supreme Court of the United States."

It then cites *Railway Company* v. *Mackey*, 127 U. S. 205, and *Railway Company* v. *Herrick*, 127 U. S. 210, as those two decisions. Yet, singularly enough, while the Bucklew case was decided in October, 1884, neither the Mackey nor the Herrick decision was "born" until April, 1888.

Nor is the logic of the rest of this opinion of the Supreme Court of Indiana any better. It ignores the fact that the Iowa statute, by its terms and by the construction of the Iowa Court, applies only to employes connected with the "operation" of the road.

This Court having decided in the Mackey case that it is competent for the legislature to enact a law of this character applicable alone to the operation of a railroad corporation, that question needed no discussion.

What was needed, imperatively demanded, if the law was to be upheld, was a demonstration that such a law directed by name, but without regard to the nature of the employment against all railroad corporations, or against all corporations, but not against natural persons, partnerships, etc., in the same business, is valid; or some sound reason for holding that the character of the employment is immaterial, or that a statute directed against *all* corporations may be good as to some, though bad as to others.

It is submitted that neither of these requirements has been met.

It may not be improper to say that that decision will soon be under review in this Court, as we are advised it has been brought here by writ of error for reconsideration.

We respectfully ask that this statute be declared invalid.

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Statement of the Case.

TULLIS *v.* LAKE ERIE AND WESTERN RAILROAD COMPANY.

CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 71. Argued and submitted October 26, 27, 1899.—Decided December 11, 1899.

The following provisions in the first section of the act of the legislature of Indiana approved by the Governor of that State on the 4th day of March, 1893, viz.: "That every railroad or other corporation, except municipal, operating in this State, shall be liable for damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases: *First.* When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with, or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition: *Second.* Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform, and did conform: *Third.* Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf: *Fourth.* Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, coemployé or fellow servant engaged in the same common service in any of the several departments of the service of any such corporation, the said person, coemployé or fellow servant at the time acting in the place and performing the duty of the corporation in that behalf, and the person so injured obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; that nothing herein shall be construed to abridge the liability of the corporation under existing laws," as they are construed and applied by the Supreme Court of that State, are not invalid, and do not violate the Fourteenth Amendment to the Constitution of the United States.

THIS case came to this court on the following certificate of the United States Circuit Court of Appeals for the Seventh Circuit:

Statement of the Case.

"In this case, duly argued and submitted to this court, there arises a question of law concerning which this court desires the instruction of the Supreme Court of the United States. The action was brought by the plaintiff in error to recover damages for an injury suffered while in the employment of the defendant in error, caused by a negligent act of a fellow servant, for which the defendant in error is alleged to be responsible by force of an act of the legislature of Indiana approved by the Governor of the State March 4, 1893. The first section of the act reads as follows:

"'1. That every railroad or other corporation, except municipal, operating in this State, shall be liable in damages for personal injury suffered by any employé while in its service, the employé so injured being in the exercise of due care and diligence, in the following cases:

"'First. When such injury is suffered by reason of any defect in the condition of ways, works, plant, tools and machinery connected with or in use in the business of such corporation, when such defect was the result of negligence on the part of the corporation, or some person entrusted by it with the duty of keeping such way, works, plant, tools or machinery in proper condition.

"'Second. Where such injury resulted from the negligence of any person in the service of such corporation, to whose order or direction the injured employé at the time of the injury was bound to conform, and did conform.

"'Third. Where such injury resulted from the act or omission of any person done or made in obedience to any rule, regulation or by-law of such corporation, or in obedience to the particular instructions given by any person delegated with the authority of the corporation in that behalf.

"'Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch yard, shop, round house, locomotive engine or train upon a railway, or where such injury was caused by the negligence of any person, coemployé, or fellow servant engaged in the same common service in any of the several departments of the

service of any such corporation, the said person, coemployé or fellow servant, at the time acting in the place, and performing the duty of the corporation in that behalf, and the person so injured, obeying or conforming to the order of some superior at the time of such injury, having the authority to direct; but nothing herein shall be construed to abridge the liability of the corporation under existing laws.'

"For the entire act reference is made to Session Laws of 1893, page 294, Burns' Annotated Indiana Statutes, Revision of 1894, paragraphs 7083 to 7087, inclusive.

"The Lake Erie and Western Railroad Company is a corporation of the State of Illinois owning and operating a railroad extending from Peoria, Illinois, into and through the State of Indiana. It is contended that the statute referred to is invalid because inconsistent with the Fourteenth Amendment of the Constitution of the United States. If it be invalid the declaration shows no cause of action, and the errors alleged to have been committed at the trial become immaterial. The opinion of this court is that material error was committed at the trial for which the judgment below should be reversed if the statute mentioned is valid, and that if the statute mentioned is invalid the judgment should be affirmed. The question whether that statute is valid or violates the Fourteenth Amendment of the Constitution of the United States the court hereby orders certified and submitted to the Supreme Court of the United States for its proper decision."

Mr. W. H. H. Miller for Lake Erie & Western Railroad. *Mr. J. B. Elam* and *Mr. J. B. Cockrum* were on his brief.

Mr. Addison C. Harris, for Tullis, submitted on his brief.

Mr. Chief Justice Fuller delivered the opinion of the court.

The contention is that the act referred to is in conflict with the Fourteenth Amendment because it denies the equal protection of the laws to the corporations to which it is applicable.

In *Pittsburgh &c. Railroad Company* v. *Montgomery*, 152 Indiana, 1, the statute in question was held valid as to railroad companies, and it was also held that objection to its validity could not be made by such companies on the ground that it embraced all corporations except municipal, and that there were some corporations whose business would not bring them within the reason of the classification. In announcing the latter conclusion the court ruled in effect that the act was capable of severance; that its relation to railroad corporations was not essentially and inseparably connected in substance with its relation to other corporations; and that, therefore, whether it was constitutional or not as to other corporations, it might be sustained as to railroad corporations.

In *Leep* v. *Railway Company*, 58 Arkansas, 407, and *St. Louis, Iron Mountain &c. Railway* v. *Paul*, 64 Arkansas, 83, an act of Arkansas of March 25, 1889, was held unconstitutional by the Supreme Court of that State so far as affecting natural persons, and sustained in respect of corporations; and in *St. Louis, Iron Mountain &c. Railway* v. *Paul*, 173 U. S. 404, that view of the act was accepted by this court because that court had so decided.

Considering this statute as applying to railroad corporations only, we think it cannot be regarded as in conflict with the Fourteenth Amendment. *Missouri Pacific Railway* v. *Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway* v. *Herrick*, 127 U. S. 210; *Chicago, Kansas &c. Railroad* v. *Pontius*, 157 U. S. 209; *Peirce* v. *Van Dusen*, 47 U. S. App. 339; *Orient Insurance Co.* v. *Daggs*, 172 U. S. 557.

In *Missouri Railway* v. *Mackey*, the validity of a statute of Kansas of 1874 providing that "every railroad company organized or doing business in this State shall be liable for all damages done to any employé of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employés to any person sustaining such damage," was involved, and it was held that it did not deny to railroad companies the equal protection of the laws. Mr. Justice Field said: "The hazardous character of the business of operating a railway would seem to call for

special legislation with respect to railroad corporations, having for its object the protection of their employés as well as the safety of the public. The business of other corporations is not subject to similar dangers to their employés, and no objections, therefore, can be made to the legislation on the ground of its making an unjust discrimination. It meets a particular necessity, and all railroad corporations are, without distinction, made subject to the same liabilities. As said by the court below, it is simply a question of legislative discretion whether the same liability shall be applied to carriers by canal and stage coaches and to persons and corporations using steam in manufactories."

In *Minneapolis &c. Railway* v. *Herrick*, the same conclusion was reached in respect of a law of the State of Iowa, that "every corporation operating a railway shall be liable for all damages sustained by any person, including employés of such corporation, in consequence of the neglect of agents, or by any mismanagement of the engineers or other employés of the corporation, and in consequence of the wilful wrongs, whether commission or omission, of such agents, engineers or other employés, when such wrongs are in any manner connected with the use and operation of any railway on or about which they shall be employed, and no contract which restricts such liability shall be legal or binding."

In *Chicago &c. Railroad* v. *Pontius*, a bridge carpenter, employed by a railroad company, who was injured through the negligence of employés of the company while assisting in loading timber, taken from the false work used in constructing a bridge, on a car for transportation to another point on the company's road, was held to be an employé of the company within the meaning of the statute of Kansas, and the validity of that act was again affirmed.

In *Peirce* v. *Van Dusen*, a similar statute of the State of Ohio applying to railroad companies was upheld by the Circuit Court of Appeals for the Sixth Circuit, Mr. Justice Harlan delivering the opinion of the court.

In *Orient Insurance Company* v. *Daggs*, in which an act of the State of Missouri in respect of policies of insurance

against loss or damage by fire was drawn in question, the objection that the statute discriminated between fire insurance companies and companies engaged in other kinds of insurance was overruled, and it was said that the power of the State to distinguish, select and classify objects of legislation necessarily had a wide range of discretion; that it was sufficient to satisfy the demands of the Constitution if the classification were practical and not palpably arbitrary, and that the classification of the Missouri statute was not objectionable in view of the differences between fire insurance and other insurance. *Railroad Company* v. *Mackey* and *Railroad Company* v. *Beckwith* were cited and approved. And see *Magoun* v. *Ill. Trust and Savings Bank*, 170 U. S. 283; *Pacific Express Co.* v. *Seibert*, 142 U. S. 339; *Atchison, Topeka &c. Railroad* v. *Matthews*, 174 U. S. 96.

By reason of the particular phraseology of the act under consideration it is earnestly contended that the decisions sustaining the validity of the statutes of Kansas, Iowa and Ohio are not in point, and that this statute of Indiana classified railroad companies arbitrarily by name and not with regard to the nature of the business in which they were engaged, but the Supreme Court of the State in the case cited has held otherwise as to the proper interpretation of the act, and has treated it as practically the same as the statutes of the States referred to. Indeed the Iowa statute is quoted from, and the case of Beckwith, as well as that of Mackey, relied on as decisive in the premises.

As remarked in *Missouri, Kansas &c. Railway* v. *McCann*, 174 U. S. 580, 586, the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the State, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. "But the elementary rule is that this court accepts the interpretation of a statute of a State affixed to it by the court of last resort thereof."

This being an action brought by Tullis to recover damages for an injury suffered while in the employment of the railroad company, caused by the negligent act of a fellow ser-

vant, for which the company was alleged to be responsible by force of the act, we answer the question propounded that

The statute as construed and applied by the Supreme Court of Indiana is not invalid and does not violate the Fourteenth Amendment to the Constitution of the United States. Certificate accordingly.